IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

CALIFORNIA.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, County of Los Angeles.

APPENDIX.

Volume II (pages 241 to 483)

THE COURT: I don't know that that's—that doesn't look like an insertion. It might be a touching, but you can't even tell for sure whether that's the situation.

MR. McDANIEL: I think it is fair to say that there's nothing in this magazine that's charged here that shows anything like these pictures do.

Here's another one that is kind of inescapable.

THE COURT: It's still—could possibly be. It's not that clear.

MR. McDANIEL: Here's another one here.

THE COURT: No. That definitely is not.

MR. McDANIEL: I'm going to flip some pages. I'll ask you just to look at these pages that I've flipped. There's about four dog ears in there that I think present more than probable cause to suspect there's insertion.

THE COURT: It's suggested. You can't tell on the first one. It doesn't have to be but it could be.

This, on page 70, is obviously retouched and you can't tell.

MR. McDANIEL: Well, I might say that the person that put this magazine out or this book out is not one of my clients, so I can't be responsible for his poor quality of photographs.

THE COURT: Well, you have photographs but you have text. And this appears to be a manual on love-making in Africa, and an allegedly scientific and/or scholastic type.

MR. IMHOFF: Your Honor, the pictures were not found obscene. The whole book was found not obscene.

THE COURT: All right. M will be rejected as not being sufficiently comparable as L.

MR. McDANIEL: Okay. Let's go on to—

THE COURT: N and O.

MR. McDANIEL: Well, forget those. I'm not going to talk about those right now.

THE COURT: Are you withdrawing them—

MR. McDANIEL: Well, I'll offer them subsequently, but I want to talk about a couple of other things. I want to introduce motion picture film now. And Exhibit P is three reels of film which were specifically found not obscene in the case of People versus Cine 73, Incorporated.

THE COURT: Three reels of film, Cine 73.

MR. McDANIEL: Well, Cine 73 and Stanley Hurst Smith, Case No. M-94458, Municipal Court of Pasadena Judicial District, County of Los Angeles, Honorable Daniel L. Fletcher, Judge, Division 3 of that court.

THE COURT: All right.

Could you call that court for a copy of their minute order and get the information?

MR. McDANIEL: Your Honor, I have—

THE COURT: You have a copy of—

MR. McDANIEL: Yes. Let me just read something first. This is a partial transcript of proceedings at the time of the verdict. And I'll just read briefly:

"THE COURT: The record will show that the jury is present in the case of People versus Cine 73 and Stanley Hurst Smith. Mr. Smith is not here, is represented by Attorney David Brown.

"Mr. LePage, I understand that you have reached a verdict.

"THE FOREMAN: Yes, we have.

"THE COURT: Would you please hand the verdict to the bailiff, please.

"I have one verdict here. The verdict concerns Cine 73 and Stanley Hurst Smith.

"Is this the verdict as to both of the defendants?

"THE FOREMAN: Yes, sir. As I understood your instructions, we were to pass on whether the film was obscene or not. This is the verdict that you have in front of you, your Honor."

Then it goes on to read off that they find not guilty—the important part is this statement on the record: ". . . we were to pass on whether the film was obscene or not. This is the verdict that you have in front of you, your Honor."

THE COURT: I'll reserve ruling on either the significance of the finding and the film itself until we've seen the film.

MR. IMHOFF: What about counsel's opening statement? This may not be admissible.

MR. McDANIEL: Well, your Honor, it was found not obscene, and I think that this shows that I could get Judge Fletcher on the phone who would validate that finding. I think that would resolve the problem.

MR. IMHOFF: We have a finding of not guilty in that case. They also probably passed on whether it was exhibited or sold or whether or not he had knowledge. They had to decide those issues, too.

MR. McDANIEL:

"THE FOREMAN: As I understood, we were to pass on whether the film was obscene or not. This is the verdict that you have in front of you."

It couldn't be more clear.

MR. IMHOFF: We don't know what the jury decided when they were in the jury room.

THE COURT: Again, I'll reserve ruling.

You may indicate that you will submit some material that will be submitted to them for determination

of comparability. You can argue perhaps that they are comparable.

MR. McDANIEL: They are. I guarantee it.

THE COURT: They will be admonished as to the nature of an opening statement.

MR. McDANIEL: I'll ask to have this one also marked as Exhibit R at this time. This film can here to be marked as Exhibit R is the film Quiet Days in Clichy. This film was found not obscene in the following case: U. S. versus 10 Reels Motion Picture Film Entitled Quiet Days in Clichy, Grove Press, Incorporated, claimant, U.S. District Court No. 70-1116-WPG.

Findings of fact and conclusions of law—Judge Gray, without a jury, made the findings of fact and conclusions of law.

I'll show your Honor the findings of fact and conclusions of law at this time. However, the specific finding was nonobscenity. The government was unable to prove that it went substantially beyond customary limits of candor; and that's mentioned in there also. And I might add that I have shown this film in several other cases.

THE COURT: All right. I'll have to handle this the same way as the other. I'll reserve ruling on all aspects until I've seen the film.

Now, tell me, are any of these—these films that you're offering, both P and R, are they fully developed plots or is it just a showing of prefornication sex play?

MR. McDANIEL: The P is just a showing of prefornication sex play throughout. There's no plot; you might say, little plotlets. It's really a sequence of a whole series of little—

THE COURT: Is there sound?

MR. McDANIEL: No, there isn't any sound to that one.

THE COURT: All right. Now, with regard to R—

MR. McDANIEL: R is a plotted film that has a sound track. And, basically, the story line isn't well developed, but it concerns a couple of young ne'er-do-wells fornicating their way through Europe in glaring detail with a lot of four-letters words, and so forth, plus pretty clear-cut showings of sexual intercourse and a great deal of nudity and sex throughout the film. I might add—well, I won't add anything else to that.

THE COURT: All right. Well, I'll have to look at those. I won't give you a ruling.

MR. McDANIEL: Now, the only other question I wanted to ask your Honor is, would it be permissible for me to merely read to the jury excerpts from the book that I intend to offer, Adam and Eve, from Hoyt? I don't want to take the jury's time to read the whole thing. I will, if you think that's necessary.

THE COURT: I guess we'll have to give it the same treatment as we gave the People.

MR. IMHOFF: You haven't ruled on J and G. Those were Hoyt versus Minnesota and Bloss versus Dykema.

THE COURT: Yes. We have to get the—the hard-bound volume is not available, so—

Now, J is—

MR. McDANIEL: Hoyt against Minnesota.

"The petition for a writ is granted and the judgment is reversed," citing Redrup. They were found obscene below. And this reversed that, and they were found not obscene.

MR. IMHOFF. They reversed, but we don't have any idea why they reversed.

MR. McDANIEL: Well, they only reversed on the issue of whether or not the stuff's obscene. That's what it means when you have—

THE COURT: Well, they say the six justices of the Minnesota Supreme Court indicated it was obscene for purposes of obscenity itself. Now, they may say that it's—

It's ambiguous. And, as a consequence, I can't say that there's a clear-cut finding.

MR. McDANIEL: Well, your Honor, I can prove that there is because that's very significant to me, that particular exhibit. And the whole situation when you have a Redrup reversal is that you have a percuriam finding of reversal citing Redrup. Redrup stands for the proposition that the material underlying is not constitutionally obscene. I think if you got 386 U.S. 767 or 87 Supreme Court 1414, that would perhaps supply the missing link here. That's the Redrup case.

THE COURT: 87 Supreme Court?

MR. McDANIEL: 1414.

THE COURT: All right. I'll reserve ruling, then, on that.

MR. McDANIEL: I'd like to, you know, get that tied down because I can prove in another fashion if I have to. It will take a few more minutes, but I'll have my associate, Mr. Fleishman, come down here because he has personal knowledge of this case and can so testify. I don't want to do that unless I have to.

MR. IMHOFF: I think the only thing we can consider is the record, in any case.

THE COURT: The record will speak for itself.

All right. Now, let's look at Bloss versus Dykema. That's 1347.

MR. McDANIEL: The cite was 1727 in 90.

THE COURT: Well, again we have the same situation where they refer to Redrup. There is no indication that that's the point upon which the Supreme Court granted certiorari. So we'll have to see Redrup.

MR. IMHOFF: Let's see. So far we have—

THE COURT: So far we have B, D and E. And we have to determine P and—

MR. IMHOF: R. Those are the two films.

THE COURT: Right.

MR. IMHOFF: And these two boxes, these are what?

THE COURT: J and G.

MR. IMHOFF: So we have to decide P and R and J and G.

THE COURT: Well, we have to see what Redrup says.

MR. McDANIEL: I think the dissent here helps to supply the context in Hoyt, of course, because it shows that the dissenters were very unhappy with that decision.

(There was held a recess.)

MR. McDANIEL: "A finding of reversal of an obscenity conviction," citing Redrup, "by the Supreme Court stands for the proposition that under no constitutional test can the materials be found obscene."

And so I ask your Honor to read for the per curiam here. And that's the text of the opinion.

I was going to ask your Honor another question. I have to rent a 16 millimeter machine unless the Court has one available. I thought perhaps it might.

THE COURT: The court has no equipment.

Does the City Attorney's office have a 16 millimeter?

MR. IMHOFF: We don't. The police department supplies these projectors to us. I don't know whether they have a good 16 millimeter or not.

MR. McDANIEL: Well, I can rent one.

THE COURT: We'll see. If not, you'll just have to rent one.

Well, it seems that the dissent in the Redrup case, Redrup et al., narrows down the issue upon which the Court made its decision. I hate to be as sacrilegious as to criticize the writings of the Supreme Court justice. However, the majority opinion does not clearly set out the fact that it has decided that its ruling is based upon its finding of lack of obscenity.

However, in Mr. Harlan's dissent on page 1417, he says "The three cases were argued together at the beginning of this term," referring to Redrup, Austin and Gent. "Today the court rules that the materials could not constitutionally be adjudged obscene by the states, thus rendering adjudication of the other issues unnecessary. In short, the court disposes of the cases on the issue that was deliberately excluded from review and refuses to pass on the questions that brought the case here."

So in the language in the majority opinion on 1416, the first paragraph:

"We have concluded, in short, that the distribution of the publications in each of these cases is protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, in personam or in rem.'

Footnote 6: "In each of the cases before us, the contention that the publications involved were basically protected by the First and Fourteenth Amendments

was timely but unsuccessfully asserted in the state proceedings. In each of these cases, this contention was properly and explicitly presented for review here."

So—

MR. IMHOFF: The court merely, though, in Redrup, your Honor, says, regardless of which view we take —and they lay out several views of different justices. It just says that, under any of these views, we have to reverse the decision. It doesn't give us any specific holding in this case. It takes the easy way out and says — counsel is only offering this evidence on the issue of contemporary community standards. That's all it would be relevant to. And we have no finding here in Redrup that the material is not beyond contemporary community standards.

MR. McDANIEL: It sets a standard of nonobscenity; can't be found obscene; can't be prosecuted. It couldn't be more clear cut.

MR. IMHOFF: I disagree with that, your Honor. Even if they had said it was not obscene, which they don't say here—

MR. McDANIEL: They don't?

MR. IMHOFF: Even if they had said it was not obscene, again we get back to the issue of contemporary community standards. And a book or a film or a picture can be found not obscene on any one of three grounds, three bases. It could be found not obscene and still go beyond contemporary community standards of the average person. Just because something is found not obscene does not mean that it does not go beyond contemporary community standards.

MR. McDANIEL: I think that goes to the weight of it. But it certainly provides a standard of nonobscenity which the Supreme Court has ruled upon.

MR. IMHOFF: The issue, though, is not nonobscenity of these materials.

MR. McDANIEL: Well, I think it is.

THE COURT: Actually, discussing the particular statutes involved, to wit, the statutes of the states of New York, Kentucky and Arkansas, paragraph 2, second column, page 1415: "In none of these cases," referring to the three cases involved herein, "was there a claim that the statute in question reflected a specific and limited state concern for juveniles," citations following. "In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure," citations following.

"And in none was there evidence of the sort of 'pandering' which the court found significant in Ginzburg versus United States."

MR. McDANIEL: Then they go on to say, under any constitutional test it can't be found obscene.

MR. IMHOFF: But they don't lay that down as a test, your Honor, what you've just read.

THE COURT: They refer to the Roth decision. Although Harlan appears to have written the Harlan decision, and he doesn't think it comes within that purview—so there you are.

MR. McDANIEL: If I could go off the record—

THE COURT: Well, the authorities submitted by the defense is very compelling, and I can't find a decision more binding than that of the Supreme Court of the United States, especially involving the constitutional issues presented, particularly the protections afforded by the First and Fourteenth Amendments. As a consequence, the Court will rule that the questioned matters may be used if they are comparable.

Insofar as Adam and Eve is concerned, that's J—

MR. McDANIEL: And you'll take judicial notice on each of those two, as you indicated previously, I believe. Correct?

THE COURT: Pardon?

MR. McDANIEL: You'll take judicial notice on those cases as—

THE COURT: I don't think I have any alternative.

MR. McDANIEL: Right.

MR. IMHOFF: I'd like the record to reflect my previous objections.

THE COURT: The record will so show.

All right. Insofar as Adam and Eve is concerned, Counsel, does it have the four-letter words found in Suite 69?

MR. McDANIEL: And it's indistinguishable—

THE COURT: And does it have the voyeurism and the flagellation and the Lesbianism and the heterosexuality and homosexuality and tri and *quatrello* sexuality that the other one has?

MR. McDANIEL: Yes. As far as I remember, it was—I might add, there was five actual books in Hoyt. And I'll bring in the others if it becomes necessary. I hate to take this jury's time with five books.

MR. IMHOFF: I would request the Court read the book and give the People a chance to read the book prior to the ruling as to whether it's comparable or not.

THE COURT: Well, all right. I guess you have the right to that. I'll just have to read it during the lunch hour. It's 11:00 o'clock. All right. Now, the Redrup decision now controls which exhibits?

MR. McDANIEL: It controls J and C. J was Hoyt. C was Bloss.

MR. IMHOFF: What was C?

MR. McDANIEL: Jaybird Photographer 9.

MR. IMHOFF: Is that a paperback?

MR. McDANIEL: That's a magazine.

MR. IMHOFF: Wait a minute. I've got G down here. What was G? They were rejected.

MR. McDANIEL: Just to give you a minute description of this book in Hoyt, I'll read what the Minnesota Supreme Court said about it. "It's unnecessary to discuss the details of these books further than to observe that the theme of each is pointless, save as it serves to relate the characters to repeated accounts of lewd and degrading episodes. They deal with filth for the sake of filth."

THE COURT: Now, what about B?

MR. McDANIEL: That was the Bonanza. You've already ruled on that.

THE COURT: Yes, that was the Appellate Department.

MR. McDANIEL: You kicked out F and G and kicked out H and I; and you kicked out L and M, and I withdrew N and O.

THE COURT: Accepted J.

Now, K is rejected, L is rejected, M is rejected. And we now have to rule on P and R. That's all that's left. A is rejected.

MR. McDANIEL: You want to see those movies right now or shall we go back and do the jury thing?

THE COURT: Yes, let's do the jury thing.

Can we see at least one of the films during the lunch hour?

MR. McDANIEL: Yes, assuming I can whip out and get a 16. Henry's Camera, I guess, would have it.

MR. IMHOFF: Have you ruled on C? I would object that it's not comparable, your Honor. It also in-

cludes text in this material, and there's much more writing and stories which do not make it comparable to the magazine that—

THE COURT: Well, there are portions that I think are comparable.

MR. IMHOFF: Again, your Honor, I'd point out that you cannot judge something by portions. All of these materials are judged taken as a whole by any court, and you can't lift photographs out of something and judge just the photographs on something that was found not obscene, because the writing may have had a very important part in the judgment of whether something was obscene or not. The photographs standing by themselves may well have been found to be obscene by a court in the same instance.

MR. McDANIEL: It's 99 per cent a picture book.

THE COURT: Well, of course, the comparable portions—the magazine, of course, can be broken down into its component parts.

MR. IMHOFF: But you can't represent, your Honor, to the jury that this magazine—that the pictures were found not to be obscene in this magazine.

MR. McDANIEL: Well, they were—the whole magazine was found not obscene.

MR. IMHOFF: And the text and the writing may have had a very important part in the determination of whether or not it was obscene or not.

MR. McDANIEL: Not in a Redrup reversal.

MR. IMHOFF: If it were merely photographs and pictures coming close to the same thing that I have, then I think the argument may have some validity, but —again, we're getting our eye off the ball, getting away from the test on obscenity.

MR. McDANIEL: That's for your argument, Counsel.

THE COURT: Well, that would be within argument. You may be right that it is not comparable on all fours, but it does seem to be substantially comparable where it depicts male and female nudes posed. And, as a consequence, that's the portion of the magazine that will be submitted to the jury.

And you're instructed to so limit—

MR. McDANIEL: We'll forget about the text.

MR. IMHOFF: I would object strenuously to the introduction of this material on the basis that the jury is not considering it as a whole, as all material has to be considered in determining obscenity. And you cannot take a portion of something found not obscene and use it as a comparable to a magazine, book or film or any other thing in issue in a case. And my objection—I have strenuous objections to all this material on the basis that it's irrelevant to the contemporary community standards. No authority in any of the cases, as far as I'm concerned, permits the introduction of this material on the issue of contemporary community standards. I just want to get that in the record.

THE COURT: Very well. The record will so note. N and O. What about those?

MR. McDANIEL: I'm pulling them back.

THE COURT: Okay. They're withdrawn.

(Recess.)

(The following proceedings were held in open court:)

THE COURT: Case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Very well. Do you wish to make an opening statement at this time, Mr. McDaniel?

MR. McDANIEL: Yes. Thank you, your Honor.

(Opening statement by Mr. McDaniel.)

MR. McDANIEL: I will at this time ask your Honor to indicate to the jury and perhaps let them examine these materials that have been found not obscene. I would ask your Honor to give them the judicial notice on those facts at this time, if I may.

THE COURT: Yes.

Defendant's B, Defendant's C, Defendant's D and E, Defendant's J—

And we've reserved ruling as to P and R; is that correct?

MR. McDANIEL: Yes.

THE COURT: All right.

MR. McDANIEL: Excuse me, your Honor.

One other point I forgot to mention. Perhaps unfortunately, this case involves one count on a written word book that you had this fellow, Mr. Helphand, read. Since that's in the case, I found it necessary to introduce another book which was found not obscene. And although I hate to say it, that one's going to have to be read to you also.

THE COURT: As to Defendant's B which consists of two magazines stapled together, one entitled Eager Beaver and the other entitled Fluff, the Court takes judicial notice of the fact that these two volumes were the subject of a decision of the Supreme Court of the United States—

MR. McDANIEL: Excuse me, your Honor. That's Exhibit C. These are the Bonanza—

THE COURT: I beg your pardon.

Defendant's B are the subject matter of a decision

of the Appellate Department of the Superior Court of Los Angeles County finding that the contents thereof are not obscene. I'll state that over again. A finding of the Appellate Department of the Superior Court that the contents in the magazines are not obscene.

Then the Court take judicial notice that Defendant's C, a magazine entitled Jaybird Photographer No. 9, the subject matter of a proceeding before the Supreme Court of the United States; found the magazine not to be obscene.

Defendant's D and E, D being a magazine entitled The Foxes and E being a magazine entitled Fantastic —the Court takes judicial notice that these items were found not to be obscene in a proceeding before the Beverly Hills Municipal Court, the Beverly Hills Judicial District.

Defendant's J—the Court takes judicial notice that Defendant's J was the subject matter of a proceeding before the Supreme Court of the United States wherein it was found that this item was not obscene.

I will further advise the jury that the decisions of the Appellate Department of the Superior Court and the decisions of the Supreme Court of the United States are binding on this Court. The decisions of the Beverly Hills Judicial District can only be considered as persuasive but not binding.

MR. McDANIEL: Your Honor, I move the introduction into evidence of those exhibits at this time.

MR. IMHOFF: People would object to the introduction of these items into evidence on the grounds previously stated in chambers.

THE COURT: The objection is overruled. The items will be received bearing the alphabetical designation assigned.

MR. McDANIEL: Perhaps before I offer those exhibits to the jury to inspect, it would be better to go on with my expert witness, if that's okay. So I would do that.

THE COURT: Very well.

DEFENSE

MR. McDANIEL: At this time we call Franklin Laven to the stand.

FRANKLIN LAVEN,

called as a witness by and on behalf of the defense, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your name for the Court.

THE WITNESS: Franklin D. Laven, L-a-v-e-n.

THE COURT: Before we proceed, the Court will withdraw reception of Defendant's J in evidence at this time until the Court has had an opportunity—it was requested by the People that the Court read the text to determine whether it is comparable. As a consequence, I'll read that during the lunch hour. The Court will rule after having read it.

DIRECT EXAMINATION

BY MR. McDANIEL:

Q State your occupation, Mr. Laven.

A I am an attorney at law.

Q How long have you been so engaged, and where is your principal office?

A I have been engaged since 1938. My principal office is at 530 West 6th Street, Los Angeles.

Q Do you have any particular specific fields that you operate in as a lawyer?

A Yes, I do.

Q What are those?

A. We determine First Amendment rights. We can determine adult material, both adult editorial and pictorial material, and we can also determine criminal law.

Q Have you had occasion to become thoroughly familiar with decisions of courts, from the Supreme Court of the United States on down, involving questions of First Amendment rights and/or obscenity of materials?

A Yes, I have.

Q Have you had an occasion to see the exhibits that are involved in this particular prosecution, a magazine entitled Yum-Yum, a paperback book entitled Suite 69, and a film entitled Tammy and Danny?

A Yes, I have.

Q Now, have you ever been associated with the Presidential Commission on Obscenity and Pornography?

A I have.

Q State to the jury what your function with the Presidential Commission on Obscenity and Pornography is or was, sir.

A My function—

MR. IMHOFF: Object to that, your Honor, as being irrelevant to the issues in this case.

MR. McDANIEL: This goes to his qualifications, your Honor.

THE COURT: It appears that the objection would be premature at this time. For that reason, the objection will be overruled.

THE WITNESS: My function was that I made a survey for the Commission as to traffic, traffic meaning

the quantity of distribution of editorial and pictorial—editorial and pictorial material throughout the United States.

BY MR. McDANIEL:

Q Did that include the entire State of California?

A That included the entire State of California and it was primarily directed to determine the volume that was produced and the volume that was sold.

Q Did you also have association with the members of the Commission staff who handled the other parts of the survey involving standards?

MR. IMHOFF: Object, your Honor. The question is vague and irrelevant.

THE COURT: Sustained.

You may rephrase your question.

BY MR. McDANIEL:

Q Did you also discuss and work with the members of the Presidential Commission staff which engaged in other portions of the survey activity involving a determining of national and state-wide standards?

A Yes, I did.

Q Now, will you please describe what the findings of these surveys were, sir.

MR. IMHOFF: Object, your Honor, as irrelevant to qualifications as an expert in this field, immaterial.

THE COURT: The objection will be sustained.

Would you describe the nature of the survey, please, what type of survey was taken, insofar as determining the state-wide standard in the State of California.

THE WITNESS: There was no particular survey that was made, as far as the Presidential Commission was concerned, as to the State of California. It was made to the United States as a whole. However, I—from my experience, I do have an opinion as to what

percentage would relate to the State of California as to the total amount of distribution, publication and distribution, of adult material throughout the United States.

The survey that I conducted related to the secondary distributors, as we call them, as compared to ID's, known as independent, which distribute the general type of reading.

MR. IMHOFF: Your Honor, object to any further testimony as nonresponsive to the question.

THE COURT: The objection will be sustained.

BY MR. McDANIEL:

Q Mr. Laven, we'll have to break this down step by step. I can see that coming, so I'll ask you some questions, specific questions.

First of all, your survey of distribution of matieral was conducted in conjunction with the survey of what the standards of the United States are; is that correct?

A That is correct.

Q And in these surveys activities—

MR. IMHOFF: Object to that, your Honor; move that it be stricken as irrelevant to state-wide standards.

THE COURT: Overruled. That answer may stand.

BY MR. McDANIEL:

Q Now, all of these survey activities conducted by the Presidential Commission were conducted for the United States as a whole, specifically, including the entire State of California; is that correct?

A That is correct.

Q What is the approximate percentage breakdown of the State of California, as opposed to the United States as a whole?

A In my opinion, it is at least 20 per cent.

Q And do you base that on a population basis of over 20 million in the State of California?

A I base it partially on the population basis, and I also base it upon my knowledge of the amount of—quantitative amount of material of the adult type that is distributed within the State of California by various publishers and distributors.

MR. IMHOFF: Your Honor, I object and move the answer be stricken as irrelevant to contemporary community standards, the amount of material published or sold.

THE COURT: Well, we're going to the qualifications. If you wish to enter an objection as to the qualifications at the appropriate time, the Court will consider the motion.

The objection will be overruled.

BY MR. McDANIEL:

Q Now, independent of your work with the Commission in these survey activities, there are other bases for your knowledge of—other bases besides—I'll strike that and start over again. I'm getting confused myself.

You, in rendering opinions, base your opinions not only on your survey activities engaged in as a member of the Commission staff but also on other factors; is that correct?

A That is correct.

Q Would you please detail to the jury what your experience in traveling throughout the entire State of California is, first.

MR. IMHOFF: Object; assumes a fact not in evidence.

BY MR. McDANIEL:

Q If you have traveled throughout the State of California.

A I have traveled throughout the State of California.

Q And have you—

THE COURT: Please read the last question and answer.

(The record was read by the reporter.)

MR. IMHOFF: I objected, your Honor, because it assumed a fact not in evidence.

MR. McDANIEL: Then I added, if you've traveled.

THE WITNESS: My answer was, I have traveled.

THE COURT: Very well. The objection will be sustained.

BY MR. McDANIEL:

Q Have you ever traveled throughout the State of California, Mr. Laven?

A Yes, I have.

Q Have you, during your travels throughout the State of California, made an attempt to determine what types of adult materials or sex-oriented materials are available and sold throughout the State of California?

A Yes, I have.

Q Have you also made an attempt to determine what the people in the State of California's viewpoints on this phenomenon are?

A I have.

Q Have you visited San Diego, California, sir?

A Yes, sir, I have.

Q Have you gone into bookstores, newsstands, motion picture theatres and film arcades in San Diego, sir?

A Yes.

Q Have you discussed the phenomenon of sex-oriented media with people in the San Diego area?

A To quite a great extent, yes.

Q Now, with regard to the Orange County area, have you done the same activity there that was alluded to in the previous list of questions?

A Yes, I have.

Q And how about with regard to Los Angeles County, sir?

A To a great extent, yes.

Q And have you also visited the metropolitan area known as San Bernardino, Riverside?

A Yes, I have.

Q And have you determined what types of adult media are sold, exhibited and available in that area?

A I have.

Q Have you also discussed these issues with people in that area?

A Yes, I have.

Q Have you had the same experience in Santa Maria, sir?

A Yes, I have.

Q Have you had the same experience in the entire Bay area, including the East Bay, Oakland area, and San Francisco itself, as well?

A Yes, I have.

Q Have you also had occasion to get down to the southern part of the Bay area, the San Jose metropolitan area?

A Yes.

Q Have you also had the same experience in the Sacramento metropolitan area?

A Yes, I have.

Q And have you also visited other smaller population centers in the State?

A Yes, I have.

Q Have you also developed expert knowledge in this area by another basis, that of discussions and interviews with people who are engaged in the publication of adult-oriented materials?

MR. IMHOFF: Object, your Honor. That calls for a conclusion.

THE COURT: Would you read the question, please.

(The question was read by the reporter.)

THE COURT: The objection will be sustained.

You may rephrase your question.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Have you also developed your knowledge of the subject matter which you're being asked to testify on here by other bases, including interviews and discussions with publishers and distributors of adult-oriented material?

A Yes, I have.

Q Have you also discussed these particular issues previously alluded to with other people, such as attorneys in the First-Amendment-law field?

A Yes.

Q Have you also discussed these matters with behavioral scientists, such as psychiatrists and psychologists?

A Yes.

Q Have you also indeed discussed these matters with police officers and law enforcement officials throughout the State?

A Yes.

Q And have you discussed these matters with members of the district attorney's office of Los Angeles County?

A I have on some occasions, yes.

Q Now, going to the survey that you personally undertook for the Presidential Commission on Obscenity, that was the one regarding the amount and volume of distribution of adult-oriented materials; is that correct?

A It's the amount of production and the distribution and sales, yes.

Q I see.

Now, you've seen People's 1 and People's 2—that's the paperback book and the magazine entitled Yum-Yum—already and have read those materials; is that correct?

A That is correct.

Q With regard to your survey of the distribution and sale of adult-oriented materials, it is based on materials which are comparable to those in those two exhibits?

MR. IMHOFF: Object to that, your Honor, as irrelevant, and calls for speculation and a conclusion.

THE COURT: Have you concluded your voir dire examination, Mr. McDaniel?

MR. McDANIEL: No, I have not. I have not yet concluded voir dire.

THE COURT: Well, this would not be voir dire subject matter. On that ground, the objection will be sustained.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Did this survey activity which you undertook consist of—rather, did the subject matters of the materials described consist of magazines involving photographs of full nudes, both men and women, with genital exposure as part of the materials sold and distributed?

A Yes. That was—

MR. IMHOFF: Object again, your Honor; same grounds.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Tell us what types of subject matter were included in your survey activity, sir.

A The type of material that were included in the survey—

THE COURT: Now, which survey are you talking of, your private survey or the Presidential survey?

MR. McDANIEL: This is the Presidential survey, I believe, we're talking about now.

THE WITNESS: I'm talking about the survey I made on behalf of the Presidential Commission. That included several categories.

MR. IMHOFF: I object again, your Honor, to any testimony on this area as irrelevant and incompetent as far as qualifications are concerned.

THE COURT: This is as to the type of survey—that's the thrust of your question?

MR. McDANIEL: Yes.

THE COURT: Overruled.

THE WITNESS: Yes, it consisted of a breakdown into various categories, among them being movie magazines—incidentally, all these are adult material—nudist magazines—

MR. IMHOFF: Object to that as calling for a conclusion, your Honor.

THE COURT: Pardon?

MR. IMHOFF: I object to that as calling for a conclusion.

THE COURT: Overruled.

You may answer.

THE WITNESS: It included movie magazines, nudist magazines, boy books, as we call them—

BY MR. McDANIEL:

Q What are those, sir?

A Boy books are primarily pictorial nude males.

Q Okay. Go ahead.

A We have—another category we call boy-girl, which is of the type of Yum-Yum in this particular case. We have double girl.

Q Two girls or more together?

A Yes. We have girlie books in which there are no splits, and then we have girlie splits.

THE COURT: What are splits?

THE WITNESS: Splits are where the genital area is exposed, where they're spreading the legs.

BY MR. McDANIEL:

Q And your survey, did it also cover paperback books devoted to sex? Is that right?

A Not only in this case, but in 1966 I made a survey of paperback books as well.

Q So you've made two separate surveys on that issue; is that right?

A That is correct. The one in '66 was in conjunction with Harold Farringer out of Buffalo, New York.

Q That's another attorney in First Amendment law?

A That is correct.

THE COURT: That would be 1966 and 1970?

THE WITNESS: No. The survey was made in relation to a case in the Superior Court in this county, and it was known as People versus Zentner. And Mr. Farringer and myself made a survey in that case as to the traffic in paperback books only, because there were only paperback books involved in that case.

BY MR. McDANIEL:

Q That was in '66?

A 1966, going into '67.

Q And then your most latter survey was throughout 1969 and portions of 1970?

A That is correct.

I might add that the 1970 survey was probably more accurate and more comprehensive and in greater detail.

MR. IMHOFF: Object to that, your Honor, as not responsive.

THE COURT: The objection is sustained. The answer is ordered stricken, and the jury is admonished to disregard it.

BY MR. McDANIEL:

Q Did the survey activities that you undertook that you've testified to involve paperback books that contained explicit sexual descriptions, such as we see in the book charged in this case?

A Yes, it did.

MR. IMHOFF: Object to that, your Honor. That calls for a conclusion.

THE COURT: "Such as we see charged" could be a conclusion. The objection will be sustained.

You may rephrase your question.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Did the two surveys that we're talking about now, the '66 and the '69-'70 survey, both include information regarding distribution and sale of paperback books which contained graphically explicit sexual passages?

A Yes, they did.

Q Now, what's the total sale of these types of material, sir?

MR. IMHOFF: Object to that, your Honor, as irrelevant and—

THE COURT: Sustained.

BY MR. McDANIEL:

Q Mr. Laven, does the amount of sale of material give us any indication of—any degree at all of what our standards are?

MR. IMHOFF: Object to that, your Honor, as calling for a conclusion and irrelevant.

THE COURT: On the latter ground, the objection will be sustained.

Remember, Mr. McDaniel, that we're in the voir dire stage.

MR. McDANIEL: I see. Pardon me.

BY MR. McDANIEL:

Q Now, with regard to motion picture film, I believe you've already testified that you're familiar with the types of adult-oriented motion picture films shown throughout this State; is that right?

A That is correct.

Q And does that include both motion picture film which is sold in a bookstore to a purchaser as well as motion picture film which is exhibited to adults in theatres and in arcades?

A Yes, it does.

Q Now, are there other factors which I have either forgotten about or left out which you use in reaching your opinions in these subject matters?

A Yes.

MR. IMHOFF: Object to that, your Honor. That question is vague.

THE COURT: Overruled.

You may answer.

THE WITNESS: Yes.

BY MR. McDANIEL:

Q List those.

A Well, you had previously asked as to discussing First Amendment problems with other attorneys. I attended a seminar in Puerto Rico in April of 1970. At that time the majority of attorneys dealing in First Amendment rights were present, and I did participate in the seminar. Likewise, I have served as a consultant to many publishers. That has been throughout the 10, 11 years that I have specialized in thus field. That is, I have served as a consultant for an opinion as to the—whether or not in my opinion the material was constitutionally protected by reason of the various decisions of our courts, both California and the United States Supreme Court.

Q When you use the phrase "constitutionally protected," does that mean that the material is not obscene?

A Yes, I would say it is synonymous with not obscene.

MR. IMHOFF: Object to that, your Honor; move it be stricken. That calls for legal conclusion.

THE COURT: Overruled. He is defining his own terminology.

THE WITNESS: I have served as a consultant or a technical advisor as to the constitutional protection of various motion pictures that are now being distributed throughout the United States and in the State of California.

BY MR. McDANIEL:

Q And, of course, you're not connected with me. I'm not working for you or anything like that; is that right?

A No, you're not.

I might likewise say that I have defended probably—or been involved in in excess of 100 of this type of case where First Amendment rights are involved. That's at all levels.

Q I see. In other words, a trial court through all the appellate steps; is that correct?

A That's correct.

Q All right.

Now, based on this background and experience that you've given to us, first of all do you have an opinion with regard to whether or not the materials charged in this case, the film, the paperback book and the magazine, are within customary limits of candor in this State, utilizing contemporary standards to determine that?

THE COURT: Just one moment, please.

Have you concluded your voir dire?

MR. McDANIEL: Yes.

THE COURT: All right. You may examine.

MR. IMHOFF: Thank you.

VOIR DIRE EXAMINATION

BY MR. IMHOFF:

Q Mr. Laven, you stated that you traveled to San Diego, Orange County, and several other cities.

How many people did you talk to in San Diego?

MR. McDANIEL: I'd object on relevance, your Honor.

THE COURT: Overruled.

You may answer.

THE WITNESS: In San Diego, I probably talked to 50 to 75 people.

BY MR. IMHOFF:

Q And when was this?

A That was over a period of time.

Q What period of time?

A That would be primarily from August—during August and September of 1970 and also of 1969.

Q And these 50 or 75 people that you talked to, sir, were they mostly people who were involved in the business of selling or exhibiting films or books?

A No. Those people would increase the amount.

Q Well, what kind of people were these 50 to 75 people you talked to?

MR. McDANIEL: Objection, unintelligible. What kind of people?

THE COURT: Overruled.

You may answer.

THE WITNESS: They were adults, male and female.

BY MR. IMHOFF:

Q And did you talk to them all at once?

A No.

Q Well, where did you talk to them?

A I can explain this quite simply because during August and September, my family is down at San Diego regularly for the summer months. And I would go down there over weekends. And groups at the place where we were staying or groups in restaurants, or it could be at other places—it could be at bars. We'd talk to them there. I would possibly raise the subject matter or they would raise the subject matter, asking what my occupation was. Being a lawyer, I would say a lawyer.

Q In other words, these were just casual conversations you'd have with people you'd meet on vacation or when you were visiting down there; is that correct?

A Well, they were a little bit more than casual. They would get into some detail, because of my interest in the subject matter.

Q Were these people usually people that you knew well?

A No. They were people that I would not have known for any great length of time, people who would get into the conversation.

Q And was your conversation mostely concerned with what is sold or distributed with regard to books or magazines or films?

A I don't quite follow your question.

Q Well, your conversation with them, in essence was it concerning what is sold or distributed in regard to books or films, sex orientation?

A Yes, as to adult-type material. The conversations would be in that relation.

Q Did you ever take any survey in the State of California, any formal survey, wherein you asked the people if any specific material went beyond the standards of their community?

A I have not made any detailed survey, but I have had clients or customers of clients—

MR. IMHOFF: Your Honor, object to any further answer as not responsive to the question.

THE COURT: Overruled. He may explain his answer.

THE WITNESS: I was saying I've had customers of my clients make surveys in their bookstores or in their theatres as to public opinion of the patrons of those businesses.

BY MR. IMHOFF:

Q And those were customers of the places that buy that kind of material; is that correct?

A Yes.

Q When you were in San Diego and you talked to these 50 or 75 people, did you ask them the question of whether any specific type material went beyond the standards of their community?

A Not specifically that. The conversations would be in general as to explicit adult material, not whether it went beyond the standards.

It would come to the point of saying, well, if one thing is accepted, why, practically everything is accepted. In other words, there was no drawing of a line of what would or would not be accepted, if the explicit sexual material was accepted at all.

Q When you visited the Orange County area, how many people did you talk to?

A Possibly 50.

Q And when was that?

A I have visited Orange County continously for the past several years, by reason of the fact that I have clients who are entitled in the distribution business in Orange County, as well as being involved in several cases in Orange County.

Q You talked to approximately 50 people in Orange County. Is that your answer?

A At least that.

Q And you can't give us any specific time in which you talked to most of these people?

A Well, it would be spread over the last two years.

Q And were these people clients of yours?

A No.

Q And where did you meet most of these people?

A These people would have been met in bookstores. They would have been met in restaurants. They would have been met in bars. They would have been

met in courtroom corridors. They might have been met —should I stay out there, or they would have been met at the hotel or the motel which I was staying at.

Q And did you ask these people specifically if any certain material, types of material, went beyond the contemporary standards of their community?

A Not in that form.

Q When you went to San Bernardino County, how many people did you talk to?

A San Bernardino County would be approximately 20 people, 25.

Q And when did that take place?

A This was over a period, I believe, last October, somewhere at that time, during that period.

Q And where did you meet those people?

A Those people would have been met in restaurants, the hotel or motel at which I was staying, courtroom corridors.

Q Were they just strangers that you would meet, mostly?

A Well, we'd get involved in conversations. It's not unusual to get involved in a conversation, inquiring to someone as to what their thoughts might be or what their opinions might be or what their feelings might be as to adult-type material. It's a subject that I'm very conscious of and that I look to get involved in conversations with strangers.

Q Did you ask any of them whether any specific type material—

MR. McDANIEL: I don't believe he finished his answer, your Honor.

THE COURT: Have you finished your answer?

THE WITNESS: That will suffice.

BY MR. IMHOFF:

Q Did you ask any of these people specifically whether any certain specific type of material went beyond the standards of their community?

A Not in that form.

Q In other words, it was just sort of informal, casual discussions with them?

A No, that is not correct, not as to—your question was as to whether any particular type of material went beyond the standards of their community. When I had become involved in conversations, it has been primarily on the basis of the adult-type material which is the explicit sexual material, not saying, "Do you accept splits?" or, "Do you accept doubles, boy-girl?" or, "Do you accept boy magazines?" or, "Do you accept trios?" or anything of that sort. It ultimately gets into that conversation, and then, very frankly, it gets into a conversation of what the feeling is as to the type of material that is now on the market today described as manuals where there is penetration and where there is—

MR. IMHOFF: Object to that, your Honor, as not responsive to the question; move it be stricken.

THE COURT: The motion is granted.

BY MR. IMHOFF:

Q When you went to Santa Maria, how many people did you talk to?

A Probably 50 in Santa Maria.

Q And over what period of time was that?

A That was during 1970. It would be spread over a period of possibly six months.

Q Did you meet these people in substantially the same places you met the other people in the other cities?

A I met some of them in the place of business of

a client of mine in Santa Maria. I would say I probably met 20 people at his place of business that I discussed the subject matter with. Other people would be in the same areas that I described before.

Q And the San Francisco Bay area. When did you—how many people did you talk to there?

A Probably, on the over-all, a hundred.

Q And over what period of time was that?

A That would be over a period of—within the last two years.

Q Spread out over the last two years?

A Yes.

Q Did you meet these people in basically the same places you met the others?

A Yes, including—in San Francisco—in the Bay area would include the places of business of the clients that I did go to see.

Q Is that the San Jacinto Mountain area?

A No. San Jacinto Mountain area would be Palm Springs.

Q Did you testify to the San Jacinto Mountain area before?

THE COURT: The San Jose metropolitan area, as I recall.

MR. IMHOFF: Right.

BY MR. IMHOFF:

Q The San Jose metropolitan area. How many people did you talk to there?

A Probably around 20, 25.

THE COURT: This might be an appropriate time to take a break in the presentation, have our lunch recess. As this matter was being presented, the Court made an important luncheon engagement. Therefore,

I won't be able to read Defendant's J until after the close of session.

Ladies and gentlemen of the jury, you're again admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinions thereon until the matter is ultimately submitted to you.

You're excused at this time and ordered to return back to this courtroom at 1:30 p.m. without further order, notice or subpoena.

All parties are excused and ordered to report back at 1:30 p.m. without further notice, order or subpoena.

(Noon recess.)

LOS ANGELES, CALIFORNIA,
TUESDAY, JANUARY 26, 1971
2:00 P.M.

THE COURT: People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Mr. Laven has resumed the witness stand.

You may resume your examination, Mr. Imhoff.

MR. IMHOFF: Thank you, your Honor.

May I have the last question and answer reread?

(The record was read by the reporter.)

VOIR DIRE EXAMINATION (RESUMED)

BY MR. IMHOFF:

Q Did you see these people, sir, in similar circumstances as to the other places you've testified to?

A Yes, sir, the circumstances are similar.

Q Did you ask any of these people whether or not any specific material went beyond the customary limits or were beyond the contemporary community standards of their community?

A It would be basically a general discussion of adult material or the sex-oriented material.

Q But you didn't ask them that question?

A As to specific material?

Q Yes, or that specific—

A I probably—if I'm not mistaken, I did have samples of various types of adult material that we've been discussing, and I did show it to them.

Q Did you ask them the question that I just asked?

A Yes, I did.

Q Did you ask them that specifically?

A I would ask them as to what their opinion as to the material, as to whether it was within the limits of candor of this community, the State of California.

Q Did you ask them whether or not the material was beyond the contemporary community standards of their community?

A Not their community, sir. The State of California.

Q You didn't ask that specific question?

A I asked the question in relation to the State of California, not their community.

MR. IMHOFF: Your Honor, I'd ask that be stricken as nonresponsive, the answer to the question.

THE COURT: The motion is granted. The answer is ordered stricken.

The jury is admonished to disregard it.

BY MR. IMHOFF:

Q You did not ask the question I specifically asked you; is that correct?

A Not there, no.

Q How many people did you talk to in the Sacramento area, sir?

A 25, 30.

Q Did you meet them under similar circumstances as the other places?

A Yes, sir.

Q And about when did you talk to these people?

A Sacramento was—I believe it would be around September of 1970, and then prior to that, about six months prior to that.

Q Did you ask any of these people in any of these cities whether any specific material went substantially beyond the customary limits of candor in its depiction or representation of these matters?

A Yes, I did.

Q You asked them that specific question?

A Not in the way that you framed it.

Q Then you didn't ask it?

A Not the way that you said.

MR. McDANIEL: Object to him arguing with the witness.

THE WITNESS: Not the way that you framed it, sir.

THE COURT: The witness will be admonished not to argue with counsel.

And, Counsel, you're admonished not to argue with the witness.

Listen carefully to the question posed to you, sir, and respond directly to the question, if you will.

THE WITNESS: Yes, your Honor.

THE COURT: Would you read the question to the witness, please.

(The testimony was read by the reporter.)

THE COURT: All right. You may proceed.

BY MR. IMHOFF:

Q Then I asked, did you ask that specific question.

A Not in that words, no.

Q What about Eureka? Were you ever up there?

A I've been to Eureka but not in connection with this type of material.

Q Then you've never talked to anybody in Eureka with regard to this material, this type of material?

A I may have but it would not be of any consequence.

Q Now, of all the people that you talked to in these various cities that you've testified to, were any of them clients of yours?

A No.

Q About what percentage of them would you say you met and talked to in what you call adult bookstores or movie theatres where sexually oriented material is exhibited?

A Probably about 20 percent.

Q I believe you testified that you've defended a hundred cases involving—was that First Amendment rights, did you say?

A Yes.

Q About how many of those cases involved alleged violations of obscenity statutes?

A All of them.

Q So you mainly earn your living by defending this type of case; is that correct?

A I don't think that's a fair statement as to how I earn my living, Counsel. I don't think I can answer that.

Q Well, you do get paid for defending these cases most of the time, don't you, sir?

A Yes, sir, I do.

Q At the present time about how many clients do you have who are engaged in the production or sale of this type of material?

MR. McDANIEL: Your Honor, I'm going to object to this line of questions. I think that it's an invasion of his privacy.

THE COURT: Overruled.

You may answer.

THE WITNESS: Six or more. There are six that are on retainer, and there are others who I do represent from time to time.

BY MR. IMHOFF:

Q About how many would you say you have represented within the last year?

A When you say "clients," do you mean publishers or distributors or dealers, or what do you mean, sir?

Q Either publishers, distributors, dealers or exhibitors.

A Well, right now in my office there are approximately outstanding in the area of about 40 cases, and those are what I would call current.

Q Would you say that it would be a fair estimate of how many of this type of case you've handled in 1970, 40?

THE COURT: Well, it does appear we're leaving the voir dire field. Limit your inquiry to voir dire, please.

MR. IMHOFF: I have no further questions at this time, your Honor, as far as qualifications are concerned. But I would object to any testimony of this witness on contemporary community standards or limits

of candor, as the witness is obviously not qualified as an expert in this field.

THE COURT: The Court will reserve ruling on the motion at this point.

Mr. Laven, you made reference to having studied and being acquainted with a survey in connection with the President's Commission; is that correct?

THE WITNESS: Yes, your Honor, that is correct.

THE COURT: And this survey had to do with determination of contemporary community standards in the State of California, did it?

THE WITNESS: On the over-all, it did, sir, yes.

THE COURT: What type of survey was this?

THE WITNESS: The survey that I was involved in related to the traffic in—

THE COURT: What we're talking about is the survey done by the Commission in connection with contemporary standards which you indicate you made reference to.

THE WITNESS: Well, that was part of the report. I have the report here in front of me. And in order to arrive at contemporary standards, they took many things into consideration. They took traffic and they also took into consideration the various other surveys that were made as to the acceptance of the material in the community, what if—

THE COURT: That's what I'm interested in.

What type of surveys did the Committee engage in?

THE WITNESS: They—for one thing, as I say, they engaged in traffic and distribution.

THE COURT: Excluding traffic, what type of surveys did they engage in?

THE WITNESS: They engaged in surveys of the various outlets. They made a complete survey as to the

number of outlets in the State of California and other states, those being retail outlets. They made surveys as to the number of publishers and distributors of both editorial and pictorial material. They made sociological surveys; they made psychological surveys. There were surveys which were made by psychiatrists, psychologists.

MR. McDANIEL: Were these of public attitudes?

MR. IMHOFF: Your Honor, I would object.

THE COURT: Yes.

Counsel, I'll give you an opportunity, should it become necessary, to further examine the witness.

Was there any attempt by this Commission to determine specific public attitudes toward materials sexually oriented?

THE WITNESS: Very definitely, yes.

THE COURT: What type of surveys were done in this regard?

THE WITNESS: There were several surveys that were made by different persons, whether they be lawyers or whether they be sociologists or professors.

THE COURT: What type of surveys did they perform?

THE WITNESS: The survey that they made is that they conducted surveys of various adult bookstores. They conducted surveys at colleges. They conducted surveys—I would only have to phrase it as related to the man on the street.

THE COURT: Was this a questionnaire-type survey at the bookstores, if you know?

THE WITNESS: In some instances, it was. In some instances, it was by personal interview.

THE COURT: Do you know whether there was any predetermined effort to attempt to take a random sample of the population on an ethnic basis?

THE WITNESS: It was supposed to be done on that basis. Whether they—

THE COURT: A religious basis?

THE WITNESS: Yes.

THE COURT: And on a socio-economic basis?

THE WITNESS: That is correct.

THE COURT: Can you tell us what controls were introduced to achieve this, if any, if you know?

THE WITNESS: What they tried to do is get a cross-section of the community by going to various persons, persons of various religious denominatons, age groups, sexes, economic circumstances, educational backgrounds, and so forth.

THE COURT: Are you personally familiar with their efforts in achieving this sampling?

THE WITNESS: I am personally familiar with it as to my discussions with members of the Commission and, likewise, by their report.

THE COURT: Now, with regard to the colleges, what type of survey was maintained at the colleges?

THE WITNESS: Well, for instance, in the colleges, I believe, one of the surveys that was conducted was in relation to the effect of sex-oriented material by repeated exposure to it.

THE COURT: Well, we're not concerned with effect. We're concerned with public attitudes, establishment of public attitudes.

What was done in that regard?

THE WITNESS: As far as the colleges, I have no personal knowledge of any survey that was made in any college in that regard as it related to personal attitudes.

THE COURT: Now what about the man-on-the-street survey that you indicated?

THE WITNESS: Yes, there was such a survey that was conducted.

THE COURT: Do you know what type of sample was used in that regard?

THE WITNESS: The type of samples, to the best of my knowledge, used in that regard was material that was available to members of the Commission which was the general type of material which was being generally distributed during the period of the survey from 1969 into 1970.

THE COURT: And was this—

THE WITNESS: It could be this book or that book or the next one. But generally, without any specificity, it was of the general type that was being generally distributed during that period.

THE COURT: Was this a survey to determine public attitude?

THE WITNESS: Yes, your Honor, it was.

THE COURT: All right.

Now, did you familiarize yourself with the compilations made by the surveyors in each of these three different surveys?

THE WITNESS: As they are reflected in the report, yes. I read that report, the report of the Commission, and I read their compilations. I was naturally more interested in my own compilations than somebody else's.

THE COURT: Now, in your informal survey in various localities that you indicated, such as Los Angeles County, Orange County, San Bernardino-Riverside area, Santa Maria, the Bay area, San Jose metropolitan area, Sacramento metropolitan area, were these discussions for the purpose of eliciting what the

individuals you talked to considered as contemporary standards in their community?

THE WITNESS: Let me say, as far as I was concerned, the discussions were for that purpose. As to the individuals, I would assume—it would be my presumption that they were a matter of general discussion. I, being very deeply concerned about this area, naturally want to talk to as many people as I possibly can to determine the attitudes and determine their acceptances.

THE COURT: Was this same situation in the formal discussions that you had at the various bookstores you mentioned?

THE WITNESS: That would be one of the purposes, yes, as to—I can say this, your Honor: that probably that to determine the acceptance, together with determining what particular type of material was moving at that particular time, which would give me an insight to pass on to the various publishers and distributors that I represent.

THE COURT: Were you assuming that because a particular publication was purchased—that it therefore must meet community standards?

THE WITNESS: No. That was not the basis of my determination. The basis of the determination would be as to what tolerance the purchaser had or what the acceptance was in the community of the particular material involved. The mere fact that something is purchased does not—did not in my mind have any affect upon what I was seeking to accomplish.

THE COURT: Now, you referred to other surveys taken by individuals who sold material sexually oriented. How many such surveys, approximately, have you studied?

THE WITNESS: I have prepared a questionnaire that was given to, I think, approximately 12 different outlets, and I do not—I did not get the total compilation on the various questions. But in those that I did compile the figures on, those which I did see, the acceptance was well above 50 per cent. In other words, the public opinion and the feeling of the community standard was that the sex-oriented material was generally accepted in the community and that the community had tolerance for it.

THE COURT: Very well.

Anything further, Mr. McDaniel?

MR. McDANIEL: Just one or two more points, your Honor.

DIRECT EXAMINATION (RESUMED)

BY MR. McDANIEL:

Q How many times have you testified as an expert witness in an obscenity case such as this, sir, in the State of California?

MR. IMHOFF: Object to that, your Honor, as irrelevant.

THE COURT: Overruled.

THE WITNESS: Approximately six or eight.

BY MR. McDANIEL:

Q Is that both in Superior Court and Municipal Court?

A Yes. Including Superior Court, it would be probably a dozen times.

Q Have you also testified in Federal courts?

A Yes, I have.

Q As an expert witness?

A Yes.

Q In rendering your opinions here, do you take into account your knowledge of the opinion samples done by the Presidential Commission as well as your own survey for the Commission, as well as your own personal tour throughout the State which you previously testified to, as well as your own knowledge as an attorney practicing specifically in this field for the past 10 or 11 years?

A Yes. All those factors are taken into consideration in my opinion.

Q Now, what is your opinion—

THE COURT: Just one moment.

Do you have any further questions on voir dire?

MR. IMHOFF: Not at this time.

THE COURT: Do you wish to enter an objection?

MR. IMHOFF: Yes, your Honor. I would object to any opinion testimony by this witness in regard to contemporary community standards or the customary limits of candor, in that the witness does not have the qualifications of an expert in this field for the State of California.

THE COURT: The Court feels that your objection goes to weight and not admissibility. Therefore, the objection will be overruled.

You may inquire, Mr. McDaniel.

MR. McDANIEL: Thank you.

BY MR. McDANIEL:

Q I'll show you first this item classified as People's 1 here, Yum-Yum Magazine.

You've looked at that magazine already, is that right, Mr. Laven?

A Yes, I have.

Q What's your opinion as to this question: Taking the material as a whole, applying contemporary stand-

ards, does that material go substantially beyond the customary limits of candor in the State of California, as a whole, in the depiction or representation of sex, nudity or excretion?

MR. IMHOFF: Your Honor, I would interpose an objection to the way the question is formed. The way the question is formed, it's irrelevant to the issue in the case as far as time is concerned.

THE COURT: As far as time is concerned? Very well, the objection will be sustained.

You may rephrase your question.

MR. McDANIEL: I don't understand what the sense of the objection was.

THE COURT: The date of this complaint is June of 1969.

MR. McDANIEL: Well, I think that it has to be judged by contemporary standards under the law. That is the problem that we've got here.

MR. IMHOFF: May we approach the bench?

THE COURT: Very well.

Will you approach the bench with the reporter, please.

(The following proceedings were held at the bench:)

MR. McDANIEL: I think that we have to judge it by today's standards, as far as I know the law. The law requires that it be considered as of the time that is in issue here which is right now, '71. "Contemporary standards" is the specific language of the Code.

MR. IMHOFF: Your Honor, at the time the crime is committed—in my hypothetical question, I made it very specific, giving the facts under which the alleged crime took place, and where it was sold, when it was sold, to whom it was sold. And defense counsel is—

the question is incomplete and irrelevant as far as this trial is concerned.

MR. McDANIEL: Let me point something out to your Honor. What he's doing is he's going to have to ask you to strike his whole witness' testimony because all his qualification and stuff took place in 1970. So if that's the way he wants to have it, he's going to have to have his whole case stricken.

MR. IMHOFF: So does yours.

THE COURT: All right. Do you have any authority to present? In framing your hypothetical—

MR. McDANIEL: I'll tell you what I'll do. I'll get by it by giving a time scope in the question that covers from the date of the offense to the present time. Would that be okay to do it that way?

THE COURT: Of course, I'll have to rule on that question as it's presented.

Now, frankly, I'm not sure whether, in this particular instance, there are those matters where the date of the offense is controlling.

MR. McDANIEL: The reason they come to contemporary standards is because it's language required by the Supreme Court to make it a constitutional statute, and that's to get past this idea that you can judge it by some pre-existing standard. In other words, the material is before this jury for determination whether it's obscene or not obscene right now. I think that's the time you have to work in. I can prove that to your Honor through cases, but I don't think it's necessary. I think I can frame this question so it will cover the whole time span. But I'm convinced that what I'm asserting is the correct law.

THE COURT: I'll give you an opportunity to rephrase your question. Are you withdrawing the question?

MR. McDANIEL: I'll just rephrase it, yes. But I want to know, you know, because, like I said, you know, his witness I don't think is qualified at all; Mickey Mouse Safeway store survey. But that didn't even take place during the time that this thing took place. So, you know, he can't have his cake and eat it, too, is what I'm trying to get at.

MR. IMHOFF: Well, if it would go beyond contemporary community standards—

THE COURT: Are you withdrawing your question and rephrasing it?

MR. McDANIEL: Sure.

THE COURT: All right. You may proceed.

(The following proceedings were held in open court:)

DIRECT EXAMINATION (RESUMED)

BY MR. McDANIEL:

Q Mr. Laven, keeping in mind this Exhibit 1, the magazine called Yum-Yum, in answering this question, and keeping in mind the fact that this magazine was sold in May, 1969, what's your opinion as to the question of applying contemporary standards, whether or not that magazine goes substantially beyond customary limits of candor in the State of California during the period of time from May, 1969, up through the present?

A In my opinion, it does not go beyond customary limits of candor in the State of California during that period.

Q Is it indeed within those customary limits of candor, sir?

A In my opinion, it is.

MR. IMHOFF: Your Honor, object. That question's been asked and answered.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Now, I'll direct your attention to this pocket book here, People's 2, pocket book called Suite 69 by I. Smithson. I believe you already testified that you've read this particular pocket book previous to coming here to court, sir.

A That is correct.

Q Again, keeping in mind that paperback book, the fact that it was sold in May, '69, what's your opinion on the question of whether or not that paperback book goes substantially beyond customary limits of candor in the State of California, utilizing contemporary standards to determine that point during the period of time from May, '69, to the present?

A My opinion is that it does not go beyond those limits of candor, customary limits of candor, in the State of California during that period.

Q I see.

Now, you're familiar with the unauthoritative rulings of the United States Supreme Court in the area of First Amendment rights and/or obscenity; is that correct?

A That is correct, sir.

Q Is that book, Suite 69, within the limits of candor as shown by materials ruled upon by that honorable court to be not obscene?

MR. IMHOFF: Object to that, your Honor, as irrelevant. It's not—

THE COURT: Sustained.

BY MR. McDANIEL:

Q All right. I'll direct your attention to—I believe this film is Exhibit 5. Anyway, you've seen this film called Tammy and Danny. I had that shown to you here in court, is that correct, Mr. Laven?

A That is correct. I saw it this morning.

Q Keeping in mind that the film was sold in May, '69, what's your opinion as to whether that motion picture film goes substantially beyond customary limits of candor in the State of California, using contemporary standards to determine that during the period of time from May '69 through the present?

A My opinion is that it does not go beyond those customary limits of candor during that period.

Q Now, do you base those opinions on both your knowledge of the surveys which we've discussed, your personal communications with people, your knowledge of what material has been sold and purchased and the volume of that, and on the other factors in your background that you've testified to, sir?

A My opinion is based upon the items that you mentioned, as well as having been very close to this field for many years and following the development of the field.

Q Sir, is it correct that today there are a great number of extremely sexually explicit materials available for sale and sold throughout this State?

MR. IMHOFF: Object to that, your Honor, as irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Now, Mr. Laven, have you had opportunity to converse with psychiatrists, psychologists and other human behavior experts?

A Yes, I have, on many occasions.

Q Have you read the material in the Presidential Commission report relating to the psychological effects of material on people?

MR. IMHOFF: I object to that, your Honor, as irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Have you read the material in the Presidential Commission report and in other words, such as the work Sex Offenders by Gebhardt from the Kinsey Institute of Sexual Study, on questions of whether or not something's got a prurient interest, i.e., a morbid or shameful interest in sex or nudity as opposed to a normal interest in sexuality?

MR. IMHOFF: Objection, your Honor. The question is compound, irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Have you read the portions of the Presidential Commission's report that discuss the question of interest in sexuality and what is a prurient interest in sexuality?

MR. IMHOFF: Object again, your Honor; same ground.

MR. McDANIEL: This goes to his qualifications, your Honor.

THE COURT: We've already established his expertise.

Do you wish to ask him whether or not in his opinion these items cater to a prurient interest?

MR. McDANIEL: Yes.

THE COURT: Why don't you ask him that question.

BY MR. McDANIEL:

Q Mr. Laven, you've—I believe it's already been established that you've seen these three exhibits, right?

A That is correct, sir, yes.

Q What's your opinion, taking into account these contemporary standards, the average person, the State of California, period of time, May '69 to the present, all those factors—what's your opinion on whether these three items have what's known as an appeal to a prurient interest, i.e., a morbid or shameful interest of the average person?

MR. IMHOFF: Object to any testimony on prurient interest, your Honor. The witness has no qualifications at all to testify as to what appeals to a prurient interest.

THE COURT: Very well.

You may lay your foundation.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q Now, have you studied authoritative works by behavorial scientists on the effect of sex-oriented material on people?

A Yes. I've read innumerable articles.

MR. IMHOFF: Object, your Honor, as irrelevant.

THE COURT: Overruled.

BY MR. McDANIEL:

Q And have you read the parts of the Presidential Commission's report on these psycho-social effects of erotic material on adult people?

MR. IMHOFF: Objection again, your Honor; same grounds.

THE COURT: Will you read the question, please.

(The question was read by the reporter.)

THE COURT: Was there such a study by the Presidential Commission?

THE WITNESS: Yes, there was such a study, your Honor.

THE COURT: Did you familiarize yourself with the material complied from this study?

THE WITNESS: Yes, I did. I read the report.

THE COURT: The objection's overruled.

You may proceed.

MR. McDANIEL: Thank you.

BY MR. McDANIEL:

Q Now, based on those factors plus your discussions with psychiatrists and psychologists, what's your opinion as to whether or not these three items have this prurient appeal to the average adult person?

THE COURT: Just a moment. Have you concluded your voir dire examination on this aspect of the witness' expertise?

MR. McDANIEL: I could keep going on it. I will. I misinterpreted what your Honor had said. I apologize.

THE COURT: I was ruling on the last objection. Very well. You may proceed.

BY MR. McDANIEL:

Q Have you had discussions with psychologists and psychiatrists regarding this issue of what constitutes a prurient appeal to people in material?

A Yes, I have had many such discussions.

Q For instance, did you talk to Dr. Goldstein about this, Fred Goldstein?

A Yes, I have spoken to Dr. Goldstein.

Q And he's a psychiatrist in Beverly Hills; is that right?

A That is correct.

Q And he's testified as an expert witness in cases like this; is that right?

MR. IMHOFF: I object to that, your Honor, as irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q Have you discussed the effects, the psychological effects, I guess you'd call it, of material like this with the people who you indicated you had conducted your informal survey, I guess we'd call it, throughout this State—did these issues get into those discussions at all?

A Yes, these issues did arise as part of the discussion.

Q Could you give me an example of how it would have arisen in a given discussion?

A An example of how this would have arisen during such a discussion is that the question would—I have often proposed the question whether or not this appealed to the prurient interest of the average person, as distinguished from the normal interest in sex. And I would—I have described the prurient interest as a shameful or a morbid interest in sex, nudity or excretion.

Q Those conversations were throughout the State, as you previously testified?

A They would develop in the course of those conversations, yes.

Q And have you read behavioral science studies of this prurient appeal question with regard to expressive media, such as books, magazines and films, wherein behavioral scientists have rendered their opinions as to the effect of these on average people throughout this State and, indeed, the United States of America?

A Yes, I have read such articles.

Q Do you base your opinions in part on your knowledge gained by your study of these research sources?

A Yes, I do.

Q And do you also base your opinion on your personal knowledge gained through discussions and interrogations of average people as well as experts in this field?

A I do.

Q And what is your opinion regarding whether or not these materials have this prurient appeal?

THE COURT: Just a moment, please.

I'll give counsel an opportunity to examine on voir dire before the question is answered.

Have you concluded your examination?

MR. McDANIEL: At this point, I believe I have.

THE COURT: All right. You may examine, Mr. Imhoff.

MR. IMHOFF: Thank you, your honor.

VOIR DIRE EXAMINATION

BY MR. IMHOFF:

Q What is your definition of prurient appeal, Mr. Laven?

A Prurient appeal is a shameful or morbid interest in sex, nudity or excretion.

Q Do you get that definition from the California Penal Code?

A It's from that, yes.

Q You said you've read behavioral science studies in regard to—is that effects of material on human beings? Is that correct, sir?

A Well, when you say "material," you are referring to the type of material that we have before us?

Q Yes.

A Which is known as adult material, is that correct, sir? Yes, I have read such articles.

Q And what particular articles have you read?

A One in particular is the report of the University

of Chicago report which was a survey which was conducted by contacting somewhere around seven, eight thousand psychologists and psychiatrists throughout the United States. The response, I think, was better than one-half. That was probably—it's indicated as one of the most comprehensive reports or surveys ever conducted, an attempt to determine the effect of erotic material or adult material upon the individual.

Q And what other articles have you read, sir?

A The Kinsey Report, I think, is somewhat related to this. There is an article—a book by Gebhardt who is a defense counsel in First Amendment rights.

Q Is he a psychiatrist or psychologist, sir?

A No. He's a lawyer.

There were discussions at the—

Q What was the name of that book?

A I don't recall the name of the book. I have read innumerable articles which I can't give you the exact location as to where they may be found, with regard to behavioral aspects of persons who read or view adult material. I have—

Q What in your opinion—I'm sorry.

THE COURT: Have you concluded your answer, Mr. Laven?

THE WITNESS: Well, I've talked to many psychiatrists and psychologists with regard to this subject, as to their opinions.

BY MR. IMHOFF:

Q What in your opinion would be a shameful or morbid interest in nudity, sex or excretion?

A That is a difficult question to answer because, just as it was described by one of the justices of the United States Supreme Court, I would have to see it first before I could have an opinion as to whether it was an appeal to prurient interest.

Q What in your opinion would shameful mean?

A Shameful? Shameful, I think, is something which is disgusting, which is out of the ordinary. It's bizarre.

Q And what would you consider a morbid—

A I think morbid is more related to something in which there's violence involved, blood; relates to excretion. Probably, morbid is tended to relate to the fetishes more so than the so-called heterosexual material.

Q I'm just concerned about your definition of morbid.

A Morbid, I think, is something that—where pain is exhibited, where it is something which gives you a sorry feeling, so to speak, something which is oppressive.

Q Is it your understanding of prurient interest that the material must arouse a person sexually?

A I don't think that the fact—within my definition, that is not the test, as to whether something arouses a person sexually, because I think there are a great number of things which are different than the editorial or pictorial material which we have before us that can arouse a person sexually. So I cannot say that material of this sort, adult material, is the only thing that can arouse a person sexually and therefore is prurient, appeals to a person's prurient interest.

Q Have you ever had any college courses in psychology?

A Well, I took psychology many, many years ago at UCLA, but it's been a long time ago.

Q And how many courses did you take?

A I think I took two psyc courses.

Q And were any of those courses specifically related to sexually oriented material?

MR. McDANIEL: I would object to the question on the basis he doesn't base his expertise on his college training of 40 years ago.

MR. IMHOFF: It goes to qualification.

THE COURT: It goes to weight, not to admissibility. The objection's overruled.

You may answer.

THE WITNESS: Mr. McDaniel is right. It's 40 years ago.

BY MR. IMHOFF:

Q Well, did those courses have anything to do with that subject—

A No, sir. In those days, this problem was not of any great consequence or issue.

MR. IMHOFF: Your Honor, would you please admonish the witness not to volunteer information, to answer the questions specifically?

THE COURT: Very well.

Respond directly to the question, if you will, sir.

THE WITNESS: Yes, your Honor.

THE COURT: You may proceed.

MR. IMHOFF: I have no other questions.

THE COURT: Very well. Your objection is overruled.

You may inquire, Mr. McDaniel.

MR. McDANIEL: Thank you, your Honor.

DIRECT EXAMINATION (RESUMED)

BY MR. McDANIEL:

Q Now,—

THE COURT: The question posed was: Do either of these exhibits, 1, 2 or 5, in your opinion appeal to a prurient interest?

THE WITNESS: In my opinion, they do not appeal to a prurient interest.

BY MR. McDANIEL:

Q Let me ask you this question, Mr. Laven:

It's possible for material, adult material, to appeal to a person's sexual interest or even sexually arouse them without them appealing to what we call a prurient interest; is that correct?

A In my opinion, that is correct. What you are speaking of I would describe as a normal interest in sex, as compared to prurient interest.

Q I see. And with regard to your opinion on whether or not these items have a prurient interest, that applies to the book, the film and the magazine charged, right?

A That is correct, yes.

Q Now, is that opinion supported by the weight of the findings by the research sources that you've indicated you have professional knowledge of?

MR. IMHOFF: Object to that, your Honor.

THE COURT: The objection will be sustained.

MR. McDANIEL: Well,—

THE COURT: It's a fact for the jury to determine.

BY MR. McDANIEL:

Q You base that opinion, anyway, on your knowledge from these research sources as well as your personal knowledge that you've already demonstrated here; is that right?

A That is correct, and my own personal experience and surveys.

Q Now, with regard to all three of these exhibits, do these exhibits have any social importance, sir?

MR. IMHOFF: Object to that, your Honor, as asking for an expert opinion from a nonexpert in that field; no foundation.

MR. McDANIEL: I'll qualify the witness.

THE COURT: The objection will be overruled.

MR. McDANIEL: I'll qualify the witness.

Q Do these items have any social importance, sir?

A Yes, in my opinion they do have social importance.

Q In what way?

A Well, they are what I would describe as educational, in some sense, for this reason: that they're—if I may give my reason.

Q Sure. Please do.

A There are many people in our society that are not informed about sex as they would possibly like to be or they should be. And, consequently, this material does in many instances educate persons as to sex.

MR. IMHOFF: Your Honor, I object to this answer. This witness has no qualifications in education or—

THE COURT: The objection goes to the weight, not to the admissibility. The objection will be overruled.

BY MR. McDANIEL:

Q Do these materials have an entertainment value to some people, sir?

A Very definitely.

Q Do any of these three materials that are before you constitute hard-core pornography?

MR. IMHOFF: Object to that, your Honor. It's irrelevant.

THE COURT: Sustained.

BY MR. McDANIEL:

Q What is hard-core pornography, Mr. Laven?

MR. IMHOFF: Object again, your Honor, as irrelevant.

THE COURT: Sustained.

MR. McDANIEL: I have no further questions.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. IMHOFF:

Q Mr. Laven, you testified, I believe, that you've qualified as an expert seven or eight times, is that correct, or was it twelve? I forget.

A Somewhere around that, yes.

Q Are you getting paid a fee to testify here today, sir?

A Yes.

Q And how much of a fee are you getting to testify here today?

A That hasn't been determined as yet.

Q What do you expect to get?

MR. McDANIEL: Well, I'd object to that. That's a matter between counsel.

THE COURT: The objection will be sustained.

BY MR. IMHOFF:

Q And the other times that you've testified as an expert, were you paid then, also?

A On some occasions I have been paid, and on other occasions I volunteered, because on a volunteer basis it was a reciprocal basis—

MR. IMHOFF: Object, your Honor, to any further answer to that question and move it be stricken; nonresponsive.

THE COURT: All right. The objection is sustained. The motion's granted.

BY MR. IMHOFF:

Q Again, I'd like to ask you, sir, how many clients in this area dealing with what you call adult material or sexually oriented material have you defended in the last year?

MR. McDANIEL: I object. That's been asked and answered.

THE COURT: Overruled.

You may answer.

THE WITNESS: You mean myself, personally?

BY MR. IMHOFF:

Q Yes.

A Or my office?

Q Yourself personally.

A Within the last year, probably, in toto, there have been around 60 or more cases, I would say; my best estimate at this time.

Q And in the last year how many cases has your office defended?

A Well, I'm involved in every case that comes into my office.

Q So the total would be 60, 70? Is that what you said?

A Well, when you say, have I represented, if you mean where there have been criminal prosecutions, that is correct. When you say, how many people in this field have I represented, there are people in this field who I represent who could be another 15 to 20 people in which there are no criminal prosecutions against.

Q Well, some people you represent in an advisory capacity; is that correct?

A Yes.

Q In other words, they're movie producers or publishers; is that correct?

A Or they could be printers. They could be distributors. They could be bookstore dealers. They could be movie owners, movie theatre owners.

Q In other words, the substance of your advice is to inform them as to what you think they can get away with in this field; is that correct?

A That is not correct, sir, not as to what they can get away with. The subject of my advice is to what my opinion is as to what is proper, what is legal, what is constitutionally protected. It's never been in the vein of what they could get away with. It is not my purpose or object to advise anybody to ever get away with anything. It's only my purpose to tell them to stay within the law as I believe the law to be.

Q It's true, is it not, that if a lot of these people that you represent, book sellers, distributors, producers —if they went out of business, you'd lose clients and fees, wouldn't you, sir?

MR. McDANIEL: Objection; speculative.

THE COURT: Argumentative. The objection will be sustained.

BY MR. IMHOFF:

Q In your discussions with these people that you said you had discussions with in all these different cities, did you ever find that there was anything in the type of material that you were discussing with them —that there was anything that would go beyond the contemporary community standards?

A I don't quite follow your question.

Q Well, in your discussions with the people in San Diego, South Bay, Los Angeles, et cetera, did you ever find that any of the people that you talked to felt that there was any of this sexually oriented material or adult material that would go beyond their contemporary community standards?

A Yes, you will always find somebody with that frame of mind in a group of people.

Q Well, what type of material would that be?

MR. McDANIEL: I'd object unless it's limited to time and place. It's too ambiguous this way.

THE COURT: The objection will be sustained.

You may rephrase your question.

BY MR. IMHOFF:

Q In your opinion, sir, is there any type of adult, as you call it, material or sexually oriented material that would go beyond the contemporary community standards of the State of California?

A Possibly, yes.

Q What type of material would that be?

MR. McDANIEL: I'd object. That calls for speculation.

THE COURT: Overruled.

You may answer.

THE WITNESS: I would say that there are certain areas in which I feel that the material does go beyond customary limits of candor; that is, in cases where there might be bestiality involved which is something that is not in good taste, where there is something in which there is—sexual relationship in which there is no text or description, some cases where there may be excretion. This, I believe, is a matter of taste. When I say personally, I would have to tell you that in my own opinion I have to relate to the phrase that appeared in a national magazine, in Time; that obscenity is in the eyes of the viewer, because certain people can look at something very, very mild and something that is unquestionably accepted and they will think it's obscene.

BY MR. IMHOFF:

Q Well, here, sir, we're dealing with the contemporary community standards of the average person in the State of California. Is that how you understand the law to be?

A Yes.

Q Now, what type of material, as an expert, sir, do you feel would go beyond the contemporary community standards of the average person in California?

A Well, editorially, I'd say, there is none. Pictorially, when we spoke of magazines of this sort—not of this sort but of magazines, then I would have to say that in some instances, probably, material might go beyond the customary limits of candor of the average person of the State of California, and that's such as I described to you. That would depend upon the material itself. Generally, what you're asking me, I think, is do I think that there is such a thing as hard-core pornography. And I can only tell you that—

MR. IMHOFF: Your Honor, I object to—

THE COURT: The objection is sustained.

MR. IMHOFF: —that part of the answer as not being responsive.

THE COURT: Yes.

Please don't interpret counsel's questions. Just respond to them.

BY MR. IMHOFF:

Q In your opinion as an expert, sir, is there any material that, to the average person applying contemporary community standards in California, would appeal to a prurient interest, a shameful or morbid interest in nudity, sex or excretion?

MR. McDANIEL: I'd object to the question on the ground that it's unintelligible to the witness.

THE COURT: Overruled.

You may answer.

MR. McDANIEL: It calls for speculation.

THE WITNESS: May I have the question again, please?

THE COURT: Would you read the question, please?

(The question was read by the reporter.)

THE WITNESS: I would have to answer that on a qualified answer. I would say that geographically my answer would be Yes, in some instances this would be true. But in general, of the average person of the State of California, I would have to say No.

BY MR. IMHOFF:

Q Well, you realize we are dealing with a state-wide standard, don't you, sir?

A Yes. That's why I specified—

Q On a state-wide basis, you would say that there's nothing that would appeal to a prurient interest to the average person—

A I don't think there's nothing. There probably is some material but not of this nature.

Q Well, I didn't ask you about this, sir. I'm asking if, in your opinion, there would be any—

MR. McDANIEL: Well, he's just answered that question. I'd object to keep going on it.

THE COURT: Overruled.

THE WITNESS: I would say there is probably some material.

BY MR. IMHOFF:

Q Do you have any idea of what type of material that would be?

A I think I mentioned that before, and that would be the type of material that is disgusting, where there is probably excretion or beastiality or other types of—let's say where there are certain types of perversions that are demonstrated.

Q You have limited it to beastiality or—

A No, I have not.

Q Sex with animals plus excretion plus perhaps certain deviant behavior; is that correct?

A. I have not limited it to that. I would have to see the material to make that determination of my own opinion. I can't just speak of it generally. Let's say this: that I think we all have our own tastes. Well, I won't elaborate on my answer. I was instructed not to.

Q What about—

THE COURT: You may explain your answer, sir, but do not try to interpret counsel's question.

THE WITNESS: No. Well, in explaining my answer, I think that each individual has a different interpretation or fantasy of what they might see, because I might view a certain thing that has no fantasy to me at all.

BY MR. IMHOFF:

Q Yes. But, sir, on a state-wide basis, the average person in California, wouldn't there be certain material to the average person in the State of California that would appeal to a prurient interest that may not to you personally or to me personally or John Doe personally but the average person? Wouldn't there be that kind of material?

MR. McDANIEL: Objection on the grounds that it calls for speculation; that it doesn't supply any meaning, your Honor.

THE COURT: Overruled.

THE WITNESS: I don't think that I can really answer that question with any authority because I don't know. I don't know whether—I do know this: that to the average person the material we have before us, in— my opinion, would not appeal to their prurient interest. There is some material, though, that possibly could appeal to the prurient interest, if there be such an interest, of our so-called average person.

BY MR. IMHOFF:

Q In other words, you're saying in effect that you really don't know what the standard is; is that correct?

A No, I'm not saying that I don't know what the standard is, because when I say—when we speak of the average person, I am taking persons from all geographic areas in the State of California. I am taking them of the adult age group, being from, let's say, 18 or 21 years old to however old they might be, the single, the married, divorced.

Q But you are giving your opinion, aren't you, sir, in regard to the average person in the State of California?

A Yes, but I'm just saying that all this type of person comes within the average person. You have to take them all and put them into a pot and mix them up and try and pull out an average person, if you can do that.

Q Then, sir, let me see if I understand you correctly.

At this time you can't say whether or not there's any material that, in your opinion, would appeal to a prurient interest or shameful or morbid interest in nudity, sex or excretion?

MR. McDANIEL: I'll object. That's been asked and answered.

BY MR. IMHOFF:

Q To the average person in California. In other words, you can't say whether there is any such material or there would be any such material?

THE COURT: The objection is overruled.

You may answer.

THE WITNESS: Truthfully, I really don't know whether there is such material that would appeal to

the prurient interest of that average person, that mythical person that we're talking about, because if we get that mythical person, who is he or—

BY MR. IMHOFF:

Q You have not found any, is that correct, in your experience?

A I have found people who material might appeal to a prurient interest, but I didn't believe that person to be the average person.

Q In other words, you have found no material in all of your wide experience that, in your opinion, taken as a whole would appeal to a prurient interest to the average person in the State of California, applying contemporary community standards?

A Are you saying, sir, in my experiences?

Q Yes.

A My experiences abroad, yes.

Q I'm saying, as an expert in this field, sir, and all your background experience, have you ever seen any material which, taken as a whole, applying contemporary community standards, appeals to the average person to a prurient interest.

A That is material that is being distributed or generally distributed in the State of California?

Q Yes.

A I would have to say generally, to the average person, my opinion would be that it would not appeal to their prurient interest. It might appeal to their normal interest in sex.

THE COURT: The question posed to you is: Have you ever seen any material that might appeal to such a prurient interest?

THE WITNESS: To the average person, I can only answer that as I did before. And my opinion

would be that I would have to say No, because I don't feel that material that I have seen would particularly appeal to the prurient interest of that average mythical person that we're talking about. There might be some that I haven't seen. I don't know. I don't claim to have seen all the material that might be distributed in the State of California.

BY MR. IMHOFF:

Q I only asked you about what you have seen, sir.

Have you ever seen any material, as an expert, in your—in all your experience and background, have you ever seen any material that, in your opinion, goes beyond the contemporary community standards of the State of California?

MR. McDANIEL: Your Honor, that's been asked and answered three separate times that I've noted.

THE COURT: Overruled.

THE WITNESS: May I have the question, please, Miss Reporter?

(The question was read by the reporter.)

THE WITNESS: My answer is No.

BY MR. IMHOFF:

Q In other words, in your opinion, the standard of the average person in the State of California would be the lowest common denominator; is that correct?

MR. McDANIEL: I'd object to that. That's argumentative.

THE COURT: Sustained.

BY MR. IMHOFF:

Q What about, as you've mentioned before, beastiality or—would you tell us what you mean by beastiality?

A That is relationship between humans and ani-

mals. And I just say that that is a personal situation with me; that I do not regard it—

Q You were giving me a personal opinion in that respect?

A That is correct.

Q Well, now, as an expert, do you think that beastiality graphically depicted would appeal to the prurient interest of the average person in the State of California?

A It might. I can't say for sure. I really don't have an opinion on that.

Q Do you feel that that would go beyond the contemporary community standards of the State of California?

A No.

Q In other words, the average person in the community would find this did not affront the contemporary community standard?

A Very likely, no.

Q What about sadism or a person getting sexual gratification from beating, whipping or humiliating another person?

MR. McDANIEL: Your Honor, I'd object unless this question is limited to: Does he mean photographic pictures of this, a movie of this, a written story of this or what? Because it's meaningless this way.

THE COURT: Very well. The objection will be sustained.

MR. IMHOFF: All right.

THE COURT: Before you proceed, can you give the Court an estimate as to how much longer you will require to complete your cross-examination?

MR. IMHOFF: It will be perhaps 15, 20 minutes. I'm not sure at this time.

THE COURT: All right. Perhaps this might be an opportune time to take our midafternoon recess.

Ladies and gentlemen, you're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

Court will be in recess. We'll reconvene at half past 3:00.

You are to report back at that time without further order, notice or subpoena.

(There was held a recess.)

THE COURT: People versus Kaplan.

The record will show the defendant is represented by counsel, the People are represented. Mr. Laven has resumed the witness stand.

You may continue.

MR. IMHOFF: May I have the last question read?

(The testimony was read by the reporter.)

CROSS-EXAMINATION (RESUMED)

BY MR. IMHOFF:

Q Limiting ourselves to the printed word, do you feel that graphic depictions of sadism in printed word would go beyond the contemporary community standards of the average person in the State of California?

A I do not.

Q Do you feel that it would in picture form, like in a magazine?

A No. I feel that it would not.

Q Do you feel that in either one of those forms it would appeal to the prurient interest of the average person in the State of California?

A I do not feel that sadism, including flagellation and bondage, would appeal to the prurient interest of the average person in the State of California.

Q Limiting ourselves to the printed word again, do you feel that acts of incest graphically depicted would appeal to a prurient interest of the average person in the State of California?

A In my opinion, it would not.

Q Do you feel it would go beyond the contemporary community standards of the average person in California?

A I feel it would not go beyond the contemporary community standards in the State of California.

Q In other words, the average person finds this acceptable; is that correct?

A I think it's generally accepted that it exists. I think the average person—

MR. IMHOFF: Would your Honor please admonish the witness to answer my questions?

MR. McDANIEL: Your Honor, he's entitled to explain his answers.

THE COURT: Well, of course, I didn't hear the answer so I don't know if it would be responsive or not.

You may rephrase your question.

BY MR. IMHOFF:

Q Well, in other words, you feel that the graphic depiction of these acts in either books, the printed word or films or magazines is acceptable to the average person?

MR. McDANIEL: I object to that question, the form of the question; improper test, improper coupling of pictorial and printed-word material.

THE COURT: The objection will be sustained.

You may rephrase your question.

BY MR. IMHOFF:

Q Do you feel that in pictorial material, such as a magazine, the graphic depiction of incest is accept-

able to the average person in the State of California?

MR. McDANIEL: Objection. That's not the test.

THE COURT: Sustained.

BY MR. IMHOFF:

Q Do you feel that this would go beyond the contemporary community standards of the average person in California?

A As your original question was framed, I would say that it would be impossible by a graphic description to indicate incest.

Q Are you referring to a picture?

A Yes. You said graphic, sir. Yes, it would be impossible to determine whether it was incest, whether there was a relationship between—if I may explain my answer.

If there is a relationship between a relative or between members of the family, that could certainly not be determined graphically.

Q You don't feel that, by the aid of props, clothing and so forth, it could be indicated that this would be mother and daughter or husband and wife?

A I don't think any props would be able to indicate mother and daughter, father and son or brother-in-law and sister-in-law and so forth. There's nothing by aid of props that could indicate that graphically.

Q Do you feel that in the printed word alone—that a graphic representation or depiction of the acts of incest go beyond the contemporary community standards of the average person in California?

A I can't answer that question when you insert the graphic, because to me graphics are pictorial. If you say the editorial description, sir, then I think I could answer your question.

Q All right. The editorial description.

A In my opinion, it does not go beyond the customary limits of candor in the State of California as to the average person.

Q Do you feel that the act of sodomy in pictorial form would appeal to the prurient interest of the average person in the State of California?

MR. McDANIEL: Your Honor, I'd object to this question on the grounds that the test we're talking about is to take a whole item, whatever it might be, as a whole; and these questions I don't think are relevant or meaningful or supply content because they're asking for isolated commentary which is not relevant to our state-wide tests or our obscenity laws.

THE COURT: Overruled.

You may answer the question.

THE WITNESS: May I have the question, please?

(The question was read by the reporter.)

THE WITNESS: I don't think it would appeal to the prurient interest of the average person, no.

BY MR. IMHOFF:

Q In other words, Mr. Laven, there's very little, if anything, in your opinion that would appeal to the prurient interest of the average person in the State of California, that is, a shameful or morbid interest in nudity, sex or excretion?

A Yes, sir. That is a fair statement.

Q And there is very little if anything, that would go beyond the contemporary community standards of the average person in the State of California?

A There probably might be some things which we talked about before; but, again, going to the average person, it's a question of what their reaction might be to it.

Q What is your opinion of the average person?

A In my opinion, the average person is what I attempted to describe to you before. It is based upon geographical areas, based upon age, based upon sex, based upon their social standards, based upon their economic standards. It's that mythical person that we attempt to identify as the average person. It's a cross-section between all of these things that I might have mentioned. When we say "average," relate to ourselves, we probably all think that we're average. But that's something that plays on words again. When you come close to the average person in the State of California, you have to eliminate certain elements. You have to eliminate the bias and hte prejudice, and you have to eliminate the person who is strong in the other direction.

Q What kind of an interest do you think an average person would have in sex?

MR. McDANIEL: Well, I'd object to that. That's not relevant.

THE WITNESS: I can answer that question.

MR. McDANIEL: I'll withdraw the objection.

THE COURT: You may answer the question.

THE WITNESS: Yes, I think the average person would have a normal interest in sex. That seems to be the trend of things and it has been probably forever, that the average person has a normal interest in sex and nudity. I think boy-girl, man and wife is part of that.

BY MR. IMHOFF:

Q You feel that an interest in acts of sadism, masochism, beastiality, sodomy, these are all normal interests in sex?

A No, I don't say that these are normal interests. These are—let's say these interests that you've men-

tioned—they have an interest to a certain segment of our society. But I don't think that the average person is either pro or con about it. They accept it or reject it.

Q Then it's not a normal interest, as you indicate, but then, at the same time, it would not appeal to the average person to a shameful or morbid interest in sex; is that correct?

A May I have the question again?

THE COURT: Would you read the question?

(The question was read by the reporter.)

THE WITNESS: I don't quite understand that question. It's a little bit compound, I think, I'm sorry.

BY MR. IMHOFF:

Q I'll try to rephrase it.

You've indicated that interest in these particular acts is not the normal interest in sex, to the average person; is that correct?

MR. McDANIEL: Your Honor, I'm going to object to this line of questioning on this basis: that what we're talking about is whether expressive media conveys this appeal or does not convey this appeal to the average person. Whether an individual has some type—

THE COURT: The previous question is vague.

You may rephrase your question.

BY MR. IMHOFF:

Q Would the graphic depiction in pictorial form of the acts I've just enumerated show in your opinion a normal interest in sex of the average person?

MR. McDANIEL: Asked and answered 12 times.

THE COURT: Overruled.

THE WITNESS: You are speaking of sodomy, you are speaking of sadism, bondage, flagellism. Those particular concepts are considered to be a fettish to the

average person. Let's say, to the average—to a masochist, let's say that this sort of depiction would not have any prurient appeal, would only have a normal appeal.

BY MR. IMHOFF:

Q We're talking about the average person now.

A The average person—I don't think that it would effect them one way or another, in my opinion. They either accept it or reject it.

Q I didn't ask you if it would effect them, sir.

A It would appeal to—

Q In your opinion, would interest in those graphic depictions represent a normal interest in sex?

A To the average person? It could or could not. I don't think that I can honestly answer that question. It's a little bit vague because of some of the—let's say, some of the average group—it might appeal to their normal interest in sex. And to some of the average person, it might not. But you are asking me—

Q Then you don't have an average person; is that correct?

A Well, no. Well, you have this average person. But when you get into your fettishes, such as you are describing, they are in a different area completely than, let's say, the normal type of activity that is displayed.

Q In other words, none of these facts graphically depicted, in your opinion, as an expert, would appeal to the prurient interest or shameful or morbid interest in nudity, sex or excretion to the average person?

A No.

MR. McDANIEL: That's been asked and answered, your Honor.

THE COURT: This is cross-examination.

THE WITNESS: In my opinion, they would not.

THE COURT: Objection's overruled.

MR. IMHOFF: I have no further questions at this time.

THE COURT: Anything on redirect, Mr. McDaniel?

MR. McDANIEL: I have no questions, your Honor.

THE COURT: Very well. Is there any further need for Mr. Laven's presence?

MR. McDANIEL: May he be excused?

MR. IMHOFF: People will stipulate he be excused.

THE COURT: All right. Thank you for coming, sir. You're free to leave if you wish.

MR. McDANIEL: At this time, your Honor, what I'd like to do is have the jury inspect the exhibits that have already been introduced into evidence as comparable exhibits, and I'd like to start that off with Exhibit—

THE COURT: You do not have a witness standing by at this time?

MR. McDANIEL: No, I do not.

THE COURT: Do you have any objection at this time?

MR. IMHOFF: No, your Honor.

THE COURT: All right. They were B, C, D and E—we have yet to rule on J. We're going to read that. You're reading that. And—well, let's show these, and then we can show the others.

MR. IMHOFF: At this time, would the Court admonish the jury on the admonishments we agreed upon in chambers?

THE COURT: Yes.

As to Defendant's B, the Court has taken judicial notice that the nonobscenity finding was made by the

Appellate Department of the Superior Court which is binding on this court.

As to Defendant's C, you're reminded that this decision was made by the Supreme Court of the United States, which is binding on this court.

As to D and E, this decision was made by the Beverly Hills Judicial District, Municipal Court of that district. You can consider it for its persuasiveness, but it is not binding on this court.

MR. McDANIEL: Thank you, your Honor.

MR. IMHOFF: I believe there was something in regard to writing in one of them.

THE COURT: Yes. In the one magazine—

MR. McDANIEL: Exhibit C.

THE COURT: Yes. You're only to consider for comparison the depictions, photographically, of male and female nudes which would be comparable to what's before us. The photographs of single female nudes or single male nudes are not material as—

MR. McDANIEL: I thought it was the text that was not material.

THE COURT: And the written text. You're not to read the written text.

MR. McDANIEL: I'll pass Exhibit B up to the jury first. That's the two magazines—

THE COURT: Am I confused now as to our agreement as to the Jaybird magazine?

MR. McDANIEL: Well, yes. You only indicate, I believe, that the text was not to be considered, your Honor.

THE COURT: Is that your understanding, Mr. Imhoff? I believe that is correct. I'm not certain.

Well, you see, the text would be integral with—

Would you approach the bench, gentlemen.

(There was a discussion at the bench.)

THE COURT: For the record, the Court is taping pages 14, 15 and 16 together. The jury is admonished not to consider the material on those pages.

Pages 24 and 25 are being taped together, and you're admonished not to consider those.

Pages 31, 32, 33, 34 and 35 are excluded.

52, 53, 54, 55—52 to 55, 60, 61, 62 and 63—I'll explain to the jury that in Defendant's C we're only concerned with those parts which—of course, the Court is not making this determination for you. It's for you to determine whether or not the material is comparable or whether there are distinctions between the material submitted and the material that is the subject matter of this case. But the Court has excluded from your consideration those matters which the Court has determined have no possibility of being declared as comparable. Therefore, that subject matter would not be for your—would not affect your determination in any way.

MR. McDANIEL: Thank you, your Honor.

I will not hand up Exhibit B. That's two magazines, Eager Beaver and Fluff, which were the magazines held not obscene by the Appellate Court ruling binding on this court. And I ask that each juror look through all of these materials.

And either now or subsequently, may I look these over with an eye toward the issues which we'll obviously be arguing in this case?

THE COURT: Well, the Court will instruct the jury, Counsel. Just give them the exhibits, if you would.

You're to disregard the commentary of counsel.

MR. McDANIEL: Exhibit C.

And the next is The Foxes. That's Exhibit D. And finally Exhibit E, a magazine called Fantastic.

(There was held a recess.)

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Has everyone seen all of the exhibits?

The record will show that all of the jurors nod in the affirmative.

Very well. Ladies and gentlemen, you're admonished that you're not to discuss the matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

You're excused at this time and ordered to report back to this courtroom tomorrow morning at 9:15 a.m. without further order, notice or subpoena.

All parties and witnesses in the case of People versus Kaplan are excused and ordered to report back at 9:15 a.m. without further order, notice or subpoena.

(Recess.)

LOS ANGELES, CALIFORNIA,
WEDNESDAY, JANUARY 27, 1971
9:30 A.M.

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented. 11 jurors are seated in their respective places in the jury panel box.

We received word this morning that Mrs. Freeman had an unfortunate accident and fell and hurt her foot. And by reason of the Court's admonition which I

thought the jury would have understood was with tongue-in-cheek, although the State has granted me many powers, I cannot declare sickness and accident impossible.

As a consequence, she felt very contrite and wanted to come in this afternoon but indicated that it might cause her discomfort. And as a consequence, we will be forced to recess until tomorrow morning when she will be here. And I hope that all of you will insulate yourself so that you will not contact any flu bugs, and walk very carefully, drive carefully so that we can proceed with the case tomorrow.

You're admonished that you're not to discuss this case among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you. You're excused at this time and ordered to report back tomorrow morning at 9:15 a.m. without further order, notice or subpoena.

(Recess.)

LOS ANGELES, CALIFORNIA,
THURSDAY, JANUARY 28, 1971
9:45 A.M.

(The following proceedings were held in chambers:)

THE COURT: We're talking about proffered Defendant's L, is it?

MR. McDANIEL: The Cine 73 film, and it's—

THE COURT: Which is the one that's the three reels?

MR. McDANIEL: The three-reel film is R—it's P. Exhibit P is what we're talking about.

THE COURT: We're talking about proposed Defendant's P.

All right. You wish to present argument?

MR. McDANIEL: Well, yes your Honor. That film —the Court's seen it. It is a comparable film to the film that's charged in this case, and I think that it's proper to show that to the jury as a comparable in a similar sense to the magazines that they've seen.

MR. IMHOFF: I would object to the admission of this film into evidence. No. 1, there's no record before the Court sufficient to determine whether or not this film was found to be obscene or not. Even if it were in the trial court, it would not be binding in this court, would not be admissible. There's no such thing as a special verdict in California.

THE COURT: This is the Pasadena case?

MR. McDANIEL: Yes.

MR. IMHOFF: There's no way to determine whether or not the jury found this film obscene or what issues they decided. They just found the person not guilty.

THE COURT: Did we get a minute order from—

MR. McDANIEL: What we had was a transcript that showed clearly they found it not obscene.

THE COURT: Yes.

MR. IMHOFF: May I see that? I haven't seen it.

MR. McDANIEL: Here.

THE COURT: We might include these minute orders and copies of findings.

MR. McDANIEL: Of course, the record already would reflect, I believe, that the other film was withdrawn by the defense—

THE COURT: Now, that would be what?

MR. McDANIEL: —after an informal discussion with the judge.

THE COURT: What that Q?

MR. McDANIEL: Clichy was R. That's been withdrawn.

THE COURT: Very well.

MR. IMHOFF: Since this is a not-guilty verdict, we can't speculate on what issues the jury decided the case on, so there's no finding of nonobscenity in this trial court verdict. The film itself is not relevant for that reason. The contemporary community standards which, as I understand it, would be the only thing that the film would be relevant with regard to—what one jury may find in the film, another jury may find just the opposite. The film is certainly not comparable, just by the very fact of its length itself. It's a two-and-a-half-hour film. The ten-minute film I have—I think that in itself is such a wide disparity in length that it would not be comparable to the film that I have. And there were other types of acts committed in this film of defense counsel of Lesbianism, group sex, and so forth, that are not present in the film in this case. it's close at all.

The Court doesn't have any authority, in my opinion, for admitting this film into evidence as comparable material. There's no adequate record or anything else.

MR. McDANIEL: I think those arguments would go to the weight of this. But, basically, it is a comparable film. Indeed, it's more candid sexually than the film charged, and yet it's found not obscene. I know that it's really a comparable film. I realize there was a problem with Exhibit R. That's why I voluntarily withdrew that one. But I think counsel's arguments probably go to the weight of the exhibit and are for argument.

THE COURT: Well, the Court has viewed the film. The Court is of the opinion that the depictions in there

could possibly factually be—portions of it would be comparable activity. Portions of it might be beyond, some of it less than. The only question that the Court is concerned about is the significance of the finding.

Now, if it's a not-guilty finding, then, of course, we can't take judicial notice of—or speculate as to what the fact finder—what factors the fact finder made the determination—

MR. McDANIEL: I think that the fact they specifically state in the transcript that they found it not obscene is properly before the Court because it's an official transcript of the proceedings, and—

THE COURT: May I see the transcript, please?

MR. McDANIEL: Yes.

MR. IMHOFF: It's a partial transcript; but, also, they read the verdict which was a not-guilty verdict. The comment of the foreman of the jury, I think, could have been an offhand remark. They certainly didn't just decide the issue of obscenity in that trial. They had to decide the other matters.

MR. McDANIEL: Exact and categorical language of the jury foreman is as follows: "As I understood your instructions, we were to pass on whether the film was obscene or not. This is the verdict that you have in front of you, your Honor."

Now, it couldn't be more clear than that.

MR. IMHOFF: I agree they would have to pass on the obscenity of the film. They'd also have to pass on whether or not the man was guilty of knowingly exhibiting it.

MR. McDANIEL: They just passed on nonobscenity. That's what the thrust of the man's statement is there.

MR. IMHOFF: We don't have the record of the

court here in regard to whether or not it was—what the instructions were. You read the last page. You'll see that it's a not-guilty verdict.

MR. McDANIEL: But the whole point is they based it on nonobscenity, and it states that right there in the record, you know. It couldn't be clearer than that.

THE COURT: Does this transcript include the instruction of the court to the jury?

MR. McDANIEL: No, it does not. Actually, we've been over this problem before, and the only question left was to look at the film to see that it was comparable, and it is comparable.

THE COURT: Well, I would make a finding that the film is comparable. But there is this problem. The foreman indicates: "As I understand your instructions, we were to pass on whether the film was obscene or not. This is the verdict that you have in front of you, your Honor."

Now, I can see where you would come to the conclusion that this may have the only issue submitted to them. It's not clear because we don't know what instructions, if any, the court gave. And I would like to know what the instructions were so I can know whether or not this answer is responsive to the instruction.

MR. McDANIEL: Well, I can explain the history of the instructions, and so forth, I think, right here.

First of all, what happened was they were given the whole batch of instructions and any argument, as well as, I believe—in the prosecutor's argument, it was stressed that they would perform their duties as follows: If they determined the film was not obscene, then they would not need to go any farther. They would be able to come back with a verdict at that

point without considering subsequent issues. If they felt that they weren't sure of whether it was obscene or not or felt that it was obscene, then they would go on to to the next step of whether or not the defendant was not guilty because of lack of scienter or some other factor like that. However, they just got to the first step and stopped there and never even considered the rest.

Now, I can prove it by another fortuitous fact because an attorney is right here in the courthouse now who was out there at the time the verdict was taken, my associate, Mr. Brown. He interrogated the jury subsequently and discussed it with the judge. I can bring Mr. Brown in to testify to that effect.

THE COURT: Would you get Judge Fletcher on the phone in Pasadena?

See, a finding of not guilty—there are more instructions—I just want to—if I could be assured in my own mind that this was the only issue, I would—

MR. McDANIEL: Well, it wasn't the only issue, you know, because they had the whole batch of instructions. But what I'm pointing out to you is that the way they decided it was on the fact that the film was not obscene. They didn't get beyond that point. They could have gotten beyond that point but they didn't. That's why we had this transcript prepared, to illustrate this properly, because the language of the foreman is quite clear there, really.

MR. IMHOFF: That's speculation, your Honor—

THE COURT: Well, of course, an answer has no meaning unless it is viewed in light of the question to which it's responding. So I just want to clear that in my own mind. I'm having the clerk call Judge Fletcher, and I will put the question to him directly.

MR. McDANIEL: If I had realized there would be this problem, in taking another step in having a formal affidavit prepared by that jury foreman—

THE COURT: Well, that would certainly be possible.

MR. IMHOFF: Well, I voiced the objection the other day.

THE COURT: Well, I had not—I wanted to see the film to determine ,the comparability. If it wasn't comparable, then, of course, this question would not have to be resolved.

MR. IMHOFF: Certainly.

THE COURT: But I do feel that it would be comparable. And if, in truth and in fact, this is the clear-cut unambiguous decision of the jury, the Court will permit the introduction of the film.

MR. McDANIEL: Would it be helpful for me to bring Mr. Brown in here to testify on this point?

THE COURT: Well, I'm not going to limit you on your foundational introduction. Perhaps so. But well —this would be a hearing that would be outside the scope of the jury.

MR. IMHOFF: Your Honor, the record itself is what we have to go on, the record of the court—I mean the transcript of the trial, the record before you, and not, you know, speculation of counsel as to what the jury determined or didn't determine.

THE COURT: The minute order—

MR. McDANIEL: The minute order by itself in a case like this, I don't think would be sufficient. That's why I brought this transcript.

THE COURT: Yes. The minute order in itself would have precluded us from even viewing the film. But I do think that the actual proceedings can be looked to.

MR. McDANIEL: Well, perhaps Judge Fletcher can throw some light on this because he was, of course, there when they came back with a verdict, and so forth. And I remember there was a kind of a problem that arose because they just came back with one verdict, and there were actually two defendants in the case. And there was a question of why they did that. And that was because they had found the film not obscene, not because they had gone to separate questions of guilt or innocence. They didn't get that far because they found it not obscene. But they might have found one of the defendants guilty and one not guilty. Those problems didn't come up. But I suspect Judge Fletcher would be able to clarify that.

THE COURT: He says it was a straight not-guilty verdict. They did not submit the sole question of obscenity; that the jury was polled in the hallway by the lawyers who reported to him that some felt the film was obscene and some felt the film was not obscene; and that they were somewhat complicated instructions, and this and that and the other. But he said this particular—they didn't rule on the question of obscenity but on the total quantum of guilt or innocence.

As a consequence, the Court will reject the offer—

MR. McDANIEL: Well, could I continue my offer by bringing in Mr. Brown to testify right now?

THE COURT: Well, I got Judge Fletcher's personal statement. I would accept it.

MR. IMHOFF: I think the testimony of Mr. Brown would be hearsay. It would be incompetent. I mean, the record, as I say, speaks for itself. That's the only competent evidence on the issue.

THE COURT: But that's exactly what Judge Fletcher said to me, so I don't know whether that was

a voluntary statement on the part of a foreman or what. But he said that that sole issue was not presented. So we cannot conclude from a finding of not guilty that the jury found the material to be not obscene. It would be one of the issues, but we do not know what the—

MR. McDANIEL: Well, would you give me about a five-minute break, then? I'd like to make a phone call myself and talk to my associate for a minute. I don't want to give up that easily on the matter.

THE COURT: All right. Certainly, I'll permit you to do so.

(There was held a recess.)

THE COURT: Judge Fletcher has acknowledged that the foreman did say what the transcript says, and I don't doubt that. I never doubted that. But from the circumstances as related by Judge Fletcher, it would appear to be a voluntary statement which may or may not have significance. It could have been a slip of the tongue. It could have been a misunderstood response. But Judge Fletcher has told me that he did not submit this one question to the jury; that they were given the complete spectrum of instructions with regard to the obscenity cases; that they were not called upon to make this one determination; that the verdict was of not guilty; that they were instructed as to knowledge and all of the other aspects of a criminal case plus the specific instructions with regard to obscenity matters; and that the jury afterward made the—on being examined by counsel, made the statements that I've previously indicated for the record, to wit, some felt it was not obscene; some felt it was obscene.

MR. McDANIEL: Before your Honor rules, may

I beg the Court's indulgence to have brief testimony by Mr. Brown? I really am concerned about this point. It won't take more than five minutes. But I would beg the Court's indulgence in that regard.

THE COURT: All right. Well, then to have everything before the Court, will you stipulate that if Judge Fletcher were duly called, sworn and testified, he would indicate as I have indicated to you with regard to his statements over the telephone?

MR. McDANIEL: Yes, sure.

THE COURT: Will you join in that stipulation?

MR. IMHOFF: Yes, your Honor.

THE COURT: All right. You may introduce the testimony of Mr. Brown.

MR. McDANIEL: May I be excused for a moment?

THE COURT: Certainly.

(There was held a recess.)

(The following proceedings were held in open court:)

THE COURT: The case of People versus Murray Kaplan.

The jury will be excused until 1:30. You're ordered to report back at 1:30 p.m. without further order, notice or subpoena, and you're again admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

The activities which we're engaged in now, depending on the outcome, will either substantially lengthen or substantially shorten the presentation. So we must resolve these matters outside your presence.

(There was held the noon recess.)

LOS ANGELES, CALIFORNIA,
THURSDAY, JANUARY 28, 1971
1:50 P.M.

(The following proceedings were held in chambers:)

THE COURT: For purposes of the record, we're presenting argument on whether or not Defendant's J shall be presented to the jury.

You may proceed.

MR. IMHOFF: Well, first of all, my objection would go to the fact that the book was reversed on Redrup versus New York. And Redrup versus New York is no authority for setting down—laying down any tests of obscenity. I don't—in my judgment, there was no specific finding of nonobscenity on the Redrup reversal. Therefore, I don't think it could be admissible. Even if we were to assume that there was, there is no indication or finding by the Court on which elements or which reasons they would find it not obscene, and I think that's very important for its relevance as far as contemporary community standards are concerned.

My other objections are to the fact that the book is not comparable to the book that is in evidence—in issue in the case. I think the book that's in issue is far more explicit. It has one sex act after another. It's more gutter language, more of the rank, lewd-type descriptions. There aren't as many sexual experiences in the book defense counsel is proposing, and they are fewer and more far between, and they are not—the book is not written in the same vein. It's a much better-written book, has much more of a plot, a story line than the book that's in evidence. And I don't see as to where they are comparable.

THE COURT: All right.

Mr. McDaniel, do you wish to respond?

MR. McDANIEL: Well, yes, your Honor. I think counsel's arguments would go to the weight, again, and it would be for argument. The book is comparable in the sense that it deals explicitly and graphically with sexual episodes of all sorts and uses all the terminology in describing those activities to great deal. It's, I think, far to say that it is indeed a comparable book, and I think that—that's all the needs to be said about it.

THE COURT: Well, the point that you raised, which I think is an interesting point, the fact that the prosecution took place in New York and that the finding would not comprise a State standard in California and that it might be—however, the Court finds that the Redrup case does, in fact, rule that the material is constitutionally protected. The Supreme Court has hinted that there is such a thing as obscenity. And the ruling of the Superior Court, even though it involves a publication prosecuted in New York, would be binding as being constitutionally protected, by reason of its non-obscenity character in California as well.

It is true, as you point out, Counsel, that it appears that this book Adam and Eve is better written, that the sex acts—it's not as gross or base, not quite as gross or base, as Tammy and Danny—Suite 69. However it is depiction in the main of the activities contained in Suite 69, and I think that counsel's point that your argument goes to the weight and not admissibility is correct, and the distinctions between the two works would be the subject matter of argument. I think it gives the jury a point of comparison on this question of community standards.

And for that reason, the Court will permit the—will receive the exhibit and permit it to be read to the jury.

MR. McDANIEL: Thank you, your Honor. I would like to start the reading off now. I'd like to take a moment to bring in my reader and introduce him to the Court, if I may. He's an attorney at law.

MR. IMHOFF: I will have objection.

THE COURT: Your objection is noted. Do you wish to enter further objection to the introduction at this time?

MR. IMHOFF: Well, yes, I—

THE COURT: All right. The Court will withdraw its ruling to permit you to—

MR. IMHOFF: I will object on the bases already made. There's no foundation for its admissibility.

THE COURT: It's the subject matter of that particular case, which ruling by the Supreme Court is binding on this Court.

Very well. The objection will be overruled. The previous ruling is reinstated.

(The following proceedings were held in open court:)

THE COURT: Case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Would you swear the next witness.

MR. McDANIEL: Before you do that, your Honor, I would ask you to indicate to the jury that you've taken judicial notice of this next exhibit and that it will be read.

THE COURT: The exhibit which will be read to you is Defendant's J entitled Adam and Eve. And you are instructed that the Supreme Court of the United States in the case of Hoyt versus Minnesota has found that the material contained in this volume is constitutionally protected and is not obscene. This decision is binding on this Court. The question as to whether this book is comparable to the exhibit entitled Suite 69 which was read to you earlier is a question of fact which you must determine; and whether or not Suite 69 goes beyond the standard of this book is for you to determine.

Very well.

MR. McDANIEL: Your Honor, I will call, as my reader for the book Adam and Eve, Mr. Burton H. Barnett to the stand.

THE COURT: Would you swear the witness, please.

BURTON H. BARNETT,

called as a witness by and on behalf of the defense, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your name for the Court, please.

THE WITNESS: Burton H. Barnett, B-a-r-n-e-t-t.

DIRECT EXAMINATION

BY MR. McDANIEL:

Q Mr. Barnett, state you occupation, please.

A I'm an attorney.

Q And were you approached by me to read the book Adam and Eve to the jury in this case, sir?

A Yes, I was.

Q I will now ask you to begin reading the work.

It is necessary, Mr. Barnett, to start off and read the entire text, including the cover page, and then going directly through.

(The book was read to the jury.)

THE COURT: This might be an opportune time to take our midafternoon recess.

Ladies and gentlemen, you're admonished that you're not to discuss this case among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

Court will be in recess. We'll reconvene at a quarter after.

You're ordered to report back at that time without further order, notice or subpoena.

(There was held a recess.)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, and Mr. Barnett has resumed the witness stand.

All right. On Chapter 5 you may proceed.

(The book was read to the jury.)

THE COURT: We're up to Chapter 9.

Very well. Ladies and gentlemen, we'll recess for the day. You're again admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

You're excused at this time and ordered to report back to this court tomorrow morning at 9:15 a.m.

(Recess.)

LOS ANGELES, CALIFORNIA,
FRIDAY, JANUARY 29, 1971 9:30 A.M.

(The following proceedings were outside the presence of the jury:)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented.

It's the Court's understanding, Mr. McDaniel, that you wish to present some evidence of a foundational nature out of order at this time?

MR. McDANIEL: Yes, I do.

THE COURT: All right. You may proceed.

MR. McDANIEL: Defendant calls Paul LePage to the stand.

PAUL J. LePAGE,

called as a witness by and on behalf of the defense, having been first duly sworn, was examined and testified as follows:

THE CLERK: Would you state your name for the Court, please.

THE WITNESS: Paul J. LePage, L-e-P-a-g-e.

DIRECT EXAMINATION

BY MR. McDANIEL:

Q Please state your occupation, Mr. LePage.

A I'm a business manager for General Electric, Space Division.

Q Were you the foreman of a jury in a trial recently concluded in the Municipal Court of Pasadena Judicial District, said case titled People versus Cine 73, Incorporated, and Stanley Hurst Smith, No. M-94558?

A Yes, I was.

Q In that case, was a verdict rendered on January 5, 1971?

MR. IMHOFF: Object to this testimony, your Honor, as irrelevant.

THE COURT: Will you make an offer of proof, Mr. McDaniel?

MR. McDANIEL: Yes.

My offer of proof is that Mr. LePage will testify as to the basis for their finding that the film involved is, indeed, not obscene and within customary limits of candor, and that that was the basis for their decision.

MR. IMHOFF: I would object, your Honor. This witness is not competent to testify to impeach the verdict of the jury.

MR. McDANIEL: It's not attempting to impeach any verdict, your Honor, at all.

MR. IMHOFF: The record speaks for itself. There was a not-guilty verdict returned in the matter, and any testimony other—along those issues would be irrelevant, would be hearsay.

THE COURT: What I'm concerned about is the question of whether or not we can go behind the minute order and the jury verdict sheet and whether or not we can go behind the responsiveness of the jury to the total instructions given.

Do you wish to address yourself to those questions?

MR. McDANIEL: Well, certainly. I'm calling Mr. LePage as a witness in this case, and he has pertinent testimony as to an exhibit which is quite relevant to this case, being the motion picture film which was found not obscene in the case in which he was the jury foreman. And it's extremely relevant, and it's perfectly proper and I can bring in this information because the determination of that jury is certainly something that can be gone into in a hearing such as this.

THE COURT: Well, you're not responding to the questions the Court posed. The question is, what authority do you have for going behind the stated verdict, as signed by the foreman, and the docket sheet?

MR. McDANIEL: I guess I don't understand your question because I don't see this as going behind the verdict.

THE COURT: The docket sheet shows a finding of not guilty. The jury verdict sheet shows a verdict of not guilty. We're not attacking that particular verdict, you see.

MR. McDANIEL: No. What we're talking about is the motion picture film which I'm attempting to introduce as a comparable exhibit in this case. And this testimony is quite pertinent as to the basis or legal status of that film. And it's not as clear as it could be from that. The transcript which I offered to your Honor previously helps to supply that reasoning. And I've asked Mr. LePage to come down here because, this way, we can clarify once and for all what that exact determination was. I think we have every right to go into that on a First Amendment proceeding. There is no case law which proscribes such activity at all, your Honor, and particularly where First Amendment rights are concerned the law jealously safeguards those rights.

THE COURT: Well, that still doesn't respond to the issue presented by the Court.

MR. McDANIEL: Which is—I don't quite understand—

THE COURT: Which is, you're seeking to go behind the stated verdict, the official stated verdict in another case, and, well, in some ways, I guess, you're trying to impeach that verdict. The verdict was not guilty.

MR. McDANIEL: I'm not trying to impeach that verdict at all. What I'm talking about is a piece of evidence which was involved in that case as the main piece of evidence, a film prosecuted for obscenity. And I'm attempting to introduce it here. And what I'm attempting to do by this testimony is prove up the legal status of that film because that's not as clear as it could be from the finding of not guilty. I'm not trying to impeach that verdict because that was the verdict that was rendered. What I'm trying to get at is what was the decision on the motion picture film that was involved in that case because that was part of the case, perhaps the main part. As a matter of fact, that's the only part the jury ruled upon. But I have every right to prove that up. And I don't see where that's impeaching the verdict at all. It's merely clarifying what the thrust of that verdict was. If there had been a special verdict available for this case, then the—there would have been a special verdict of nonobscenity. However, we don't have special verdicts available for cases of this nature, and so I must go in this direction to prove up the underlying substantive fact. I don't see any other way that it can be done.

THE COURT: The Court will permit the testimony.

You may proceed.

MR. McDANIEL: Thank you, your Honor.

MR. IMHOFF: People will object.

THE COURT: The objection is noted and overruled.

You may proceed.

BY MR. McDANIEL:

Q Mr. LePage, did that case involve a prosecution of a motion picture film which was a three-reel film

and which is the film that was shown at the Cine 73 Theatre on the date in question in that case?

A I believe it was, yes.

Q Now, that film is Exhibit P in this case, and that film was shown to the jury in the Cine 73 case, is that correct, by the prosecution?

A Yes, it was.

Q Now, after the jury heard all the evidence in that case and was instructed on all points of the law, it then retired to deliberate and render a verdict, is that correct, Mr. LePage?

A Yes.

Q You were elected as foreman by the jury when you retired to deliberate?

A Yes, I was.

Q Now, then the jury decided that the motion picture film was not obscene; is that correct?

MR. IMHOFF: I'll object to that, your Honor, as hearsay evidence. It's an attempt to impeach the verdict of not guilty in the case. The issues were decided—

THE COURT: It's leading and suggestive. The objection will be sustained on that ground.

BY MR. McDANIEL:

Q What was the verdict that the jury came back with in this Cine 73 case?

A Well, following the instructions of the—

THE COURT: Just respond to the question. What was the verdict—

THE WITNESS: Not guilty.

BY MR. McDANIEL:

Q Now, in determining that issue, did the jury consider the point of whether or not the film was obscene or not obscene and nothing else?

A Yes.

MR. IMHOFF: Object to that, your Honor, as irrelant, leading and suggestive.

MR. McDANIEL: It's certainly not irrelevant and it's certainly not leading.

THE COURT: Overruled.

You may answer the question.

THE WITNESS: Yes, we did.

BY MR. McDANIEL:

Q What was the jury's decision on the question of whether the film was obscene or not obscene?

MR. IMHOFF: Object to that, your Honor, calls for hearsay.

MR. McDANIEL: He's the foreman of the jury.

THE COURT: Overuled.

You may answer.

THE WITNESS: We found the film not—to be not obscene.

BY MR. McDANIEL:

Q To be not obscene?

A Not obscene.

Q Did the jury in the Cine 73 case find that the film was within the customary limits of candor of the State of California, using state-wide standards?

MR. IMHOFF: Object to that, your Honor, as irrelevant, incompetent; calls for hearsay.

THE COURT: Overruled.

You may answer.

THE WITNESS: Yes, we determined it was within the customary limits of candor.

Can I expand on that a little bit, your Honor?

THE COURT: Just respond to questions, please, Mr. LePage.

BY MR. McDANIEL:

Q Now, as a result of that finding, the jury was able then to determine that the film was not obscene, correct?

A Yes.

MR. IMHOFF: Object, your Honor; leading and suggestive.

THE COURT: Sustained.

Mr. McDANIEL: Well, it's already been testified to that they found the film not obscene.

THE COURT: The objection is to the form of the question which has been sustained.

MR. McDANIEL: All right.

BY MR. McDANIEL:

Q As a result of that determination that the film was within the customary limits of candor, what was the jury able to conclude with regard to the film?

MR. IMHOFF: Object, your Honor. It's been asked and answered.

THE COURT: Sustained.

MR. IMHOFF: It's been testified it was found not obscene.

BY MR. McDANIEL:

Q Now, it's also true perhaps that there was a failure of proof on the other elements of obscenity, is that correct, as far as the jury was concerned?

MR. IMHOFF: Object, your Honor; leading and suggestive, irrelevant.

THE COURT: The form of the question is objectionable.

MR. McDANIEL: I'll just go on to something else then.

THE COURT: You may ask the question in interrogatory form without suggesting an answer.

BY MR. McDANIEL:

Q Mr. LePage, after the jury determined that the film in question, which is Exhibit P in this case, was not obscene, did they find any necessity to deliberate further on any other issues?

A No, we did not.

Q Because of the finding of not obscene of the film, did the jury then, because of that alone, render its verdict of not guilty?

MR. IMHOFF: Object, your Honor; calls for a conclusion; irrelevant.

THE COURT: It would be conclusionary. The objection will be sustained.

BY MR. McDANIEL:

Q As a result of finding that the motion picture film was not obscene, what did the jury then do?

MR. IMHOFF: Object again, your Honor. All this calls for hearsay evidence on the part of this witness. Other jurors are not here. I don't have a chance to cross-examine them on their testimony or what they said, what they knew.

THE COURT: Overruled.

You may answer the question.

THE WITNESS: I'm sorry. Could you repeat that?

BY MR. McDANIEL:

Q Yes. As a result of finding the film not obscene, what did the jury then do?

A We let the judge know that we had reached a verdict.

Q And was was that verdict?

A The verdict was not guilty. We could not—

MR. IMHOFF: Object, your Honor; nonresponsive.

THE COURT: You may explain your answer.

THE WITNESS: Okay. We didn't feel that—since

we determined that the movie was not obscene, we didn't see how there could be any guilt on the part of the two defendants, so we said Not Guilty.

BY MR. McDANIEL:

Q I see. Thank you, Mr. LePage.

MR. McDANIEL: I have no further questions.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. IMHOFF:

Q When you made this decisions, you followed all the instructions of the judge, did you not?

A To the best of our ability, we did, yes.

Q And you also had to consider, did you not, whether or not he sold the material or whether he distributed it or whether or not he knew, had knowledge —

MR. McDANIEL: Objection; multiple and compound.

THE COURT: Objection sustained.

You may rephrase your question in its component parts.

BY MR. IMHOFF:

Q You also had to consider whether or not he had knowledge within the law, did you not, sir?

A We didn't go that far with the deliberations. Once we determined that the movie was not obscene, it didn't seem to us to matter how—what this—

Q Weren't there other jurors, sir, in the jury room who felt that it was obscene?

MR. McDANIEL: Objection; argumentative, leading.

THE COURT: Overruled.

THE WITNESS: Well, we—we took four hours to deliberate, as I recall, roughly four hours.

THE COURT: Listen to the question and respond to the question.

Would you read the question to the witness, please?

(The question was read by the reporter.)

THE WITNESS: Eventually, no.

BY MR. IMHOFF:

Q Well, when you took your notes, as you say, wasn't that polling that you look for a verdict of guilty or not guilty?

A Yes, we did—we took votes.

Q For guilty or not guilty; is that correct?

A Yes.

Q So then you don't know whether the jury, when they were voting for guilty or not guilty, were voting on the issue of obscenity or on the issue of knowledge or on the issue of whether it was sold or exhibited; isn't that correct?

A All of the discussion had been with respect to the film. So, as foreman, I assumed that this is what we were voting on. And, as a matter of fact, I deliberately stated that this is what we were voting on, whether the film was obscene or not.

Q The votes which counted they were for not guilty, is that correct, were on the issue of guilty or innocence?

MR. McDANIEL: I'd object to the question. It's arguing with the witness.

THE COURT: Overruled.

You may answer.

THE WITNESS: Well, that's the only way we had —that's the way we decided we would cast our ballots, guilty or not guilty, to determine whether the film was either obscene or not obscene. Rather than write "obscene" or "not obscene," we wrote "guilty" or "not guilty."

BY MR. IMHOFF:

Q You can't say at this time whether the other jurors were voting on the issue of obscenity or voting on the issue of knowledge or voting on the issue of whether it was sold or distributed; is that correct?

A To the best of my knowledge, ability, all of us were voting on the common issue of obscenity.

Q You were assuming that's what they were voting on; is that correct?

A Well, we specifically stated that in our deliberations, that this is what we were considering.

MR. IMHOFF: I have no other questions.

THE COURT: Very well.

MR. McDANIEL: I have no questions.

THE COURT: All right.

May Mr. LePage be excused?

MR. McDANIEL: Yes.

THE COURT: Join in the stipulation, Mr. Imhoff?

MR. IMHOFF: Yes.

THE COURT: Thank you for coming, sir. You may leave if you wish.

Very well. Do you wish to present argument, Mr. McDaniel?

MR. McDANIEL: Well, yes, your Honor. The testimony of Mr. LePage is extremely clear-cut that the decision, the only decision, made was that the film was not obscene, further clear-cut testimony that the decision was based on the finding that the film was within customary limits of candor, therefore not obscene. The record here supplied speaks for itself, your Honor. It's crystal clear as to what the basis of that decision was. And this Court has already ruled that the motion picture film involved in that case is a comparable film to the film charged in this case.

I think, on the state of this record, that this Court has the duty to allow this film to be introduced as evidence for the defense in this case. It's absolutely crystal clear at this point.

MR. IMHOFF: Your Honor, there's absolutely no authority for the proceedings here today. Everything this witness has testified to is merely hearsay evidence. The record speaks for itself. It's a not-guilty verdict. What counsel here is really attempting to do is impeach the verdict of the jury and make it a special verdict which it was not. And the witness has testified, actually, he was assuming that's what they were voting on. We can't go behind and beyond the verdict, a general verdict in California, to determine whether or not—what the issues were that it was decided upon. That irrelevant and incompetent. And the only thing we have here is the word of this one juror. And we have the testimony of the judge—I believe it was Judge Fletcher; is that correct?

THE COURT: That's correct.

MR. IMHOFF: —who testified that—

MR. McDANIEL: He didn't testify at all, Counsel.

THE COURT: There was a stipulation as to his testimony.

MR. McDANIEL: No. There was a stipulation as to what he said over the phone. That wasn't testimony. And he never said anything about what that jury based it on, anyway, other than what the foreman of the jury said, and this was correct, that that's what he said.

MR. IMHOFF: I believe there was a stipulation that if he were called, sworn and testified—that he would testify as to what was said to you over the telephone. I believe that was the stipulation.

MR. McDANIEL: Yes, exactly.

THE COURT: All right. You may proceed.

MR. IMHOFF: And from the statements of Judge Fletcher, the attorneys discussed the matter with the jurors afterwards and talked it over with him, and it was his testimony that some of them felt it was obscene, some of them felt it was not obscene.

MR. McDANIEL: I won't stipulate to that because he didn't—wasn't present in these discussions, and that wasn't what my—counsel who was out there talked to them and found out at all. And we have clear-cut testimony by Mr. Le Page on what the basis was.

THE COURT: Mr. McDaniel, give Mr. Imhoff an opportunity to conclude his comments. It's terribly rude of you to interrupt him every time he opens his mouth.

MR. McDANIEL: I apologize.

THE COURT: You'll be given an opportunity to address this Court. Now, proceed in a professional manner, if you would.

All right. You may proceed.

MR. IMHOFF: I think that the testimony of Judge Fletcher is entitled to great weight in this matter. He was close to the situation right after it happened, when it was discussed with other attorneys. Attorneys had discussed it with jurors. He said that he gave them the full gamut of instructions on 311.2 and that they returned a general verdict of not guilty. And I think we're only speculating as to why, and it's irrelevant anyway as to why they found a verdict of not guilty. You can't lay a foundation for the admissibility of evidence by impeaching—in this manner, trying to impeach the verdict of another jury.

THE COURT: All right. You may respond, Mr. McDaniel.

MR. McDANIEL: Yes, your Honor.

First of all, Mr. LePage's testimony is crystal clear. He indicated that it was the clearly stated basis of their votes that it was limited to whether the film was obscene or not obscene. The reporter can read back that testimony if anybody has a shadow of a doubt as to what he said. He stated that the only issue they determined was that the film was not obscene. They didn't feel required to go further because, once they determined the film was not obscene, that was the end of it. So they were able to render their verdict of not guilty.

The important point is that the basis of that verdict was that the motion picture film was not obscene, specifically because it's within the customary limits of candor. That is not impeaching a verdict. That is merely finding out what the basis for the determination was, which is not impeaching a verdict because the verdict obviously stands. Nobody's trying to impeach the validity of that verdict. The important point, I think, here is that we have sworn testimony by the person most properly in a place to really know what happened, the foreman of that jury, who was in there and led the deliberations during the entire deliberative process of that jury. His testimony here, to me, seems to be overwhelmingly clear. And I would submit that on that basis the question which was perhaps unclear yesterday is completely clear now; that that film was indeed found to be not obscene by this jury and for customary-limits-of-candor reasons which is uncontradicted testimony. That renders the admissibility of this film, in my judgment, beyond question. And I think

that it would be a denial of procedural due process not to allow defendant to use this motion picture film which—it's already been determined to be a comparable film. And I don't see any other possibility than that, your Honor.

THE COURT: Very well. Of course, the Court finds that the general question of guilt or innocence was submitted to the jury based upon instructions covering the entire spectrum of the offense, insofar as the issues to be presented to the jury are concerned. The testimony of this witness as to what the jury did, of course, is within the province of his testimony. His conclusions as to what the other 11 jurors might have thought, of course, would be conclusionary. The Court could not consider that aspect of his testimony. The Court is compelled, by the statements of Judge Fletcher as to what was submitted to the jury—and of course, the actual verdict of the jury is a matter of record, both from the jury verdict sheets and the docket sheets of that case.

As a consequence, the offer is proof is rejected. The films will be excluded.

MR. McDANIEL: Could I ask, on what basis?

THE COURT: I 've just explained the basis.

MR. McDANIEL: Well, then, your Honor, I'm going to have to renew my motion to introduce the film that I withdrew which is Exhibit R in this case, and I'm going to offer specific findings of fact that prove that that film was determined to be not obscene by a Federal judge in this state. I think that this amounts to a denial of due process to the defense in this case.

But, anyway, I'm going to go on to Exhibit R and ask that you reconsider Exhibit R at this time which is Quiet Days in Clichy.

This film was determined to be not obscene by a Federal judge, and—

MR. IMHOFF: I would object, your Honor, to these proceedings because—

THE COURT: Mr. Imhoff, I admonished Mr. McDaniel about interrupting you. And I'm going to admonish you about interrupting Mr. McDaniel. Please give him an opportunity to conclude his comments. You can take notes and answer it point by point.

MR. IMHOFF: I'm sorry, your Honor. I didn't mean to be rude or interrupt. I wanted to get an objection on the record to the proceedings before he began, and that was the reason that I interrupted.

THE COURT: You may proceed, Mr. McDaniel.

MR. McDANIEL: Anyway, that was in U.S. versus 10 Reels Motion Picture Film Entitled Quiet Days in Clichy. I've already submitted to this Court the findings of fact and rulings of law prepared by Judge Gray in that case which show that the prosecution was unable to prove that the film went substantially beyond customary limits of candor and that the judge finds the film to be not obscene.

That motion picture film has been seen by this judge. It contains extremely candid sexual activities in the nude between men and women. I want to use that as a comparable film in this case. The test of comparability is whether or not something's been charged with obscenity, whether it deals with sex and nudity. It's not ever that it has to be the same motion picture film as the one charged in the case because that could never be. And so I will submit that film at this time.

THE COURT: Very well.

Mr. Imhoff, you may now respond.

MR. IMHOFF: Thank you, your Honor.

May I ask if there is a copy of the opinion before the Court? Has defense counsel offered—

THE COURT: I'm accepting defense counsel's words, insofar as the opinion. He seems to have a copy of the opinion.

MR. McDANIEL: Well, I had a findings of fact. This is a judgment, and I handed in the—

THE COURT: For purposes of the offer of proof, the Court will accept counsel's representations.

MR. IMHOFF: Well, I would object to this proceedings, to begin with, because the film has been withdrawn previously, number one.

THE COURT: He's resubmitting it.

MR. IMHOFF: Number two, I believe that in that case, your Honor, the Court specifically found that there was—the film had artistic merit, and that was the reason that they found it not obscene. As I recall, reading that, there was—I believe they specifically stated that they did not—that it did go beyond customary limits of candor, beyond the contemporary community standards, or else they weren't deciding that issue. I don't recall. But I think the findings of the court were that the film had artistic merit which was the redeeming social importance that made it not obscene. I don't think there can be any argument that that film is in any way comparable to the ten-minute film of the People. That film had sound. That film had plot and a story. That film went un hour and a half or so. It was a far more sophisticated production. It had obviously some artistic merit to it.

The issue of comparability—I believe the Court has indicated previously that it did not feel that the film was comparable. So I think that the film ought to be rejected as a comparable film to the People's exhibit. That's all.

MR. McDANIEL: I'll respond to counsel's argument by pointing out that counsel engages in evasions, misstatements and improper interpretations based on not even having read the opinion. That's completely improper conduct by counsel. I'd ask that he be assigned for misconduct to those statements, your Honor, first of all.

THE COURT: The motion is denied.

MR. McDANIEL: Number two, that motion picture film was adjudged to be not obscene. That motion picture film deals with sex and nudity. We're not conducting an examination in the critical merits of motion picture film here. I doubt if counsel is any more qualified than I or your Honor to make artistic judgments. We're only interested in whether something's obscene or not obscene, under the First Amendment. And that film was found not obscene. It deals with sex in a more candid and graphic manner than the film the prosecution claims is obscene in this case.

This jury is entitled to be able to see what these decisions are, see the exhibits underlying these decisions. And so I think that that film has to be shown to the jury. I'll submit it on that basis.

THE COURT: Well, the Court finds that Quiet Days in Clichy is not comparable to the film at bar.

Firstly, it has a story content, words and music. The editing of the film has artistic merit. The dialogue or copy has artistic merit. It has a story content to it. It has social messages. Whether you agree with the message or not, it does contain social statements. The film before us is a film in color with no music, no sound, no story content. It appears to be a depiction of prefornication sex play and display of genitalia. And for those reasons, I don't think the works are comparable.

And as a consequence, the offer of proof is rejected, and the film will be excluded.

MR. McDANIEL: All right.

At this point I will advise your Honor that I have further evidence to present at the conclusion of reading this book, and I will withhold on that until the book is read. But because of the nature of these rulings, I will not rest my case at that point.

THE COURT: Very well.

(There was held a recess.)

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

You may proceed, Mr. McDaniel.

MR. McDANIEL: I'll call Bob Harris to the witness stand.

ROBERT HARRIS,

called as a witness by and on behalf of the defense, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Robert Harris.

DIRECT EXAMINATION

BY MR. McDANIEL:

Q Please state your occupation, Mr. Harris.

A I'm an assistant professor at California State College at Long Beach.

Q Did I ask you to come up to conclude the reading of a book Adam and Eve to the jury in this case, sir?

A Yes, you did.

MR. McDANIEL: May I approach the witness?

THE COURT: Very well. You may approach the witness.

I take it, Mr. Barnett is not able to resume reading the exhibit?

MR. McDANIEL: No.

THE COURT: The Court will permit you to substitute this witness for Mr. Barnett.

MR. McDANIEL: Thank you.

BY MR. McDANIEL:

Q Mr. Harris, I will ask you to start reading from the top of Chapter 9 here which is where we broke off at the recess yesterday afternoon.

(The book was read to the jury.)

THE COURT: Ladies and gentlemen, you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

Court will be in recess. We'll reconvene at ten minutes after. You're ordered to report back at that time without further order, notice or subpoena.

(There was held a recess.)

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box, and the witness has resumed the witness stand.

Your may proceed.

(The book was read to the jury.)

THE COURT: This would be an appropriate time to recess for lunch, ladies and gentlemen.

You're admonished that you're not to discuss this

matter among yourselves nor with anyone else, nor are you to form or express an opinion thereon until the matter is ultimately submitted to you.

You're excused at this time and ordered to report back to this courtroom at 1:30 p.m. without further order, notice or subpoena.

All parties and witnesses in the case of People versus Murray Kaplan are excused and ordered to report back at 1:30 p.m. without further order, notice of subpoena.

(There was held the noon recess.)

LOS ANGELES, CALIFORNIA,
FRIDAY, JANUARY 29, 1971
2:00 P.M.

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, all jurors are seated in their respective places in the jury panel box. The witness has resumed the witness stand.

You may proceed with your reading, sir.

(The book was read to the jury.)

THE COURT: Perhaps we should give the book to the jury. It appears that the subsequent material is not numbered, from 196 on.

Start off with Juror No. 1 and pass the book down.

MR. McDANIEL: May Mr. Harris be excused, your Honor?

THE COURT: Yes.

Any further need for Mr. Harris' presence?

MR. IMHOFF: No.

THE COURT: Thank you for coming, sir. You're free to leave.

MR. McDANIEL: Thank you, Mr. Harris.

Your Honor, I have a motion with regard to some additional possible films which I'd like to make.

THE COURT: Very well. We'll wait until the jury has looked at the book and have our midafternoon recess. You can bring that matter up at that time.

The record will show, that the jury has seen the material.

Ladies and gentlemen, you're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

We will resume with the presentation as soon as the motions have been concluded. I can't predict at this time how much time that will take.

Do you think that it would go beyond 15 minutes, gentlemen?

MR. McDANIEL: I don't think so.

THE COURT: All right. We'll reconvene at 3:00 o'clock. You're excused and ordered to report back at that time without further order, notice or subpoena.

(The following proceedings were held in chambers:)

THE COURT: The record will show that the following proceedings are taking place in chambers outside the purview of the jury.

MR. McDANIEL: The next—

THE COURT: Before we proceed, I'll again give you my position in these matters. I want a clear, unambiguous factual determination on the question of ob-

scenity and a determination as to substantial comparability before I'll permit the exhibit to be shown to the jurors.

MR. McDANIEL: I understand. The first request I have here is perhaps a little bit different than that, but let me go through it because this is a request for you to take judicial notice of a decision which was rendered by the Ninth Circuit and then affirmed by the United States Supreme Court. And that's in the case of Pinkus versus Pitchess. It's the case below. The Ninth Circuit opinion is found in 429 Federal Reporter 2d 416.

THE COURT: Do you have a copy?

MR. McDANIEL: I have a copy which I'll hand up to your Honor. The case designation number is No. 24294.

THE COURT: Excuse the interruption.

Now, you want me to look at Pitchess versus Pinkus?

MR. McDANIEL: I believe it's Pinkus versus Pitchess.

THE COURT: What's the citation?

MR. McDANIEL: The official case number in the United States Court of Appeals, Ninth Circuit, is No. 24294. It's a decision handed down by the Ninth Circuit on June 29, 1970.

THE COURT: What's the citation?

MR. McDANIEL: 429 Federal Reporter 2d 416.

Now, subsequently to this decision, which was a finding of nonobscenity on a motion picture film which had been found obscene in the State court, went to the Court of Appeals by way of habeas corpus through the District Court where relief was denied and petitioner appealed, the Court of Appeal held that the film

underlying the case was not obscene. The State took that to the United States Supreme Court who, subsequently, affirmed this opinion without writing their own opinion. And so this is—really stands as the opinion that was adopted by the Supreme Court.

I ask your Honor to read this opinion. And I will ask your Honor to take judicial notice of it.

I'll hand it to you before I—

THE COURT: Have you read it?

MR. IMHOFF: I read it a long time ago. I'd like to read it again.

MR. McDANIEL: There's something in here that's the identical text.

MR. IMHOFF: I may have a copy in my briefcase out there.

MR. McDANIEL: Fortunately, I have a complete copy in the Supplement to the cases starting with that per curiam.

THE COURT: I'll let you check that out. It seems to me, if it was affirmed by the Supreme Court, that there is a ruling which would be binding on this Court.

Do you have the film?

MR. McDANIEL: No. What I'm asking you to do with this one is read the description of the film to the jury from the case opinion on this basis: that that's proper because here I've tried unsuccessfully to obtain the motion picture film. The law firm which handled the case, unfortunately, is in Cleveland, and I've been unable to get any way at all of obtaining the underlying film. So I'm asking you to take judicial notice of it and read the description of the film found not obscene here and affirmed by the Supreme Court to the jury.

THE COURT: Well, I would like to know whether or not we have the same type of genitalia display. It could be substantially comparable. It could not. It just indicates that she simulates sexual satisfaction self-induced.

MR. McDANIEL: Disrobed.

THE COURT: Disrobed. Well, a side view without a display of the genitalia. Of course, I don't know if that would be comparable. I can't make a finding on the basis of that description.

MR. McDANIEL: Well, I think on the basis of the description here that you at least can see, in terms of comparability—first of all, the man was charged with obscenity for this film. He was indeed convicted after a trial in the California courts of obscenity based on this film. Appeals were unavailing, and finally the Federal route proved successful and the film was declared to be not obscene. And it deals with a person nude going through masturbation activities. I think that that's clear enough on its—the face of this opinion that it's comparable in the constitutional sense. I think that it's proper to read the description in the opinion to the jury where the film is unavailable. I unfortunately cannot get a hold of the motion picture film.

MR. IMHOFF: I would object to that, your Honor, as—

THE COURT: I would not be disposed to do it unless I could make a predetermined finding of substantial comparability. I can't say—it may be. I don't know. I can't tell from that description. We have to know the nature and extent of the exposure of the genitalia, the nature and extent of the activity which they describe is self-induced sexual gratification. If it's a side view and if the props are such that you don't get

the graphic display of the nudity, it could be very substantially dissimilar.

MR. McDANIEL: Well, let me hold off on a continuation of this presentation until I have some other matters to go over. I'll try to verify a couple more facts by a telephone call subsequently.

THE COURT: You can't get a hold of the film? It seems to be—it might be in evidence here? Was the evidence ever removed from the court?

MR. McDANIEL: Well, I know that it went to the District Court and to the Circuit Court and—let me just hold off on that for the time being. I will be able to determine something else by a phone call. But I have to say that—

THE COURT: All right. Do we have any further use for the jury today?

MR. McDANIEL: There is a possibility. There are a couple of other matters.

(There was held a recess.)

MR. IMHOFF: Well, on the most recent request of counsel, we're going to hold off on any argument or decision on that until—

THE COURT: I'll give you a chance to check this out.

MR. IMHOFF: I'll hold off on my objections and everything.

THE COURT: I'll give you an opportunity to provide the film or whatever it is he wants to do.

MR. McDANIEL: I've got two other items to offer. First, I will next offer in as a comparable exhibit to the motion picture film charged in this case the following motion picture film. And this is offered in on the basis indicated in In re Harris and other cases, including Noroff, of an example of a motion picture film

which is available in the State of California and is sold. This is a film where there is no litigation. This was merely a purchased film, purchased from an adult bookstore.

And with regard to comparability, I will make the following offer of proof:

First of all, let me make the offer of proof regarding how and where it was purchased. This motion picture film was purchased in San Francisco on December 26, 1970, at Randy's Book and Magazine Store, 73 Taylor Street, San Francisco. I have the business card of the store, the receipt of purchase of the film which cost $35, and the motion picture film. The motion picture film is marked as Exhibit S-1. The receipt is marked as Exhibit S-2. The card of the store is Exhibit S-3.

With regard to an offer of comparability, this film is in full color. It depicts in clear graphic detail a man and a woman. The woman is stripped down naked, lies down on a bed, is tied to the bed. The man proceeds to whip the woman with a rope for a period of time. Then he proceeds to disrobe, has an erection, and proceeds to have clear-cut graphically depicted sexual intercourse with the woman. The film is not under prosecution anywhere. It's openly offered for sale and was sold, and comparable films are available, by my own personal inspection, at innumerable locations throughout California including all over Los Angeles County.

I make that offer of proof and offer in as evidence Exhibit S just alluded to.

MR. IMHOFF: I would object to the receipt of this exhibit, your Honor. It is not relevant to prove contemporary community standards. What may be available in the community may very well be illegal. This film we're prosecuting now was available in the

community at one time. In re Harris does not make a provision that you may enter material that is available in the community. In re Harris—at that time we were concerned with a local standard in the community. Since In re Giannini, we're concerned with a state-wide standard. All In re Harris stands for is that you may introduce evidence to prove contemporary community standards. However, I could go out and buy many things in the market that may be illegal and say, well, just because it's available, therefore it's, you know, all of a sudden legal. This may very well violate the Roth standards. We have no proof that it's not being prosecuted anywhere. Hundreds of films like this are being prosecuted. I believe there's a case, the Appellate Department of the Superior Court, which definitely makes it clear that materials purchased in the community are not relevant to contemporary community standards.

I believe I have a copy of it in my briefcase, if you would give me a few minutes to get it.

MR. McDANIEL: May I make an observation in response?

THE COURT: Yes, certainly.

MR. McDANIEL: First of all, if there is such an opinion by the Appellate Department, it cannot overrule a ruling by the California Supreme Court. In re Harris is a California Supreme Court case. Your Honor's already read the case. It classifies three elements of evidence, expert testimony, material purchased in the community, and litigated material. With regard to counsel's argument on Giannini, it doesn't have merit because the relevant community has been classified to be the State. It doesn't really matter that the relevant community at that time may have been classified as something else, although that position was never ruled

upon. It was offered as evidence supportive of what the standards of that community were. And this is offered as evidence supportive of what the standards of the state-wide community are. That's one reason I feel it was more probative to have purchased the film in San Francisco rather than here in Los Angeles.

The In re Harris case doesn't distinguish between those three classes of evidence, and it holds that it's a denial of due process of law not to allow defendant to introduce evidence of contemporary community standards.

Again, your Honor is thoroughly familiar with the Harris case. That's the basis of my offering.

THE COURT: Well, as I said earlier when you attempted to introduce various magazines on the same theory, as I read the Harris case, the Court stated that the defendant was deprived of introducing evidence of community standards and stated the offer of proof made by the defendant as to what evidence he intended to submit. It's this Court's opinion that the fact that somebody has purchased an item does not necessarily establish that item as coming within the contemporary community standards.

The offer of proof will be rejected.

MR. McDANIEL: Could I ask—supplemental authority for this proposition—that your Honor consider the case of Luros against United States? That's an Eighth Circuit opinion, 1968, found in 389 Federal 2d 200.

THE COURT: I've read that case in the past. The ruling will stand.

MR. McDANIEL: All right.

I now make the following offer: In the recent case of People against Natali and Sullivan in the San Fran-

cisco Municipal Court, City and County of San Francisco, Judge Harry Lowe, judge presiding, San Francisco Municipal Court, Criminal, Nos. R22045 and R22047, in a decision handed down on January 11, 1971, just some two and a half weeks ago, Judge Harry Lowe held the motion picture film Mona to be a nonobscene motion picture film which is protected by the First Amendment to the United States Constitution.

I offer the film Mona for the jury's consideration on the basis of the fact that it has been found not obscene in a final determination. The case is not on appeal. The motion picture film Mona is a color motion picture film which contains complete genital nudity, male and female, contains complete sexual activity between male and female, graphically depicted, clearly depicted, was found not obscene, and, moreover, has played in Los Angeles County for well over three months without any legal problems whatsoever, is now currently playing at the Eros Theatre on La-Brea. And I offer it in as a comparable exhibit to the motion picture charged in this case on the basis both of its nonobscenity and on the basis of its having played in Los Angeles County as well as San Francisco for many months. I would request that I be allowed to take the jury to the theatre to see the motion picture film.

THE COURT: Well, the Court would require a copy of the docket sheet and/or some memorandum opinion or some proof of the finding. And the Court will have to view the picture before it will submit the matter to the jury.

MR. McDANIEL: Well, let me do this: Let me make this request, then.

I would request that your Honor perhaps see if your clerk can call the Court and get that sent down immediately. If that's not good enough, I can contact an attorney friend in San Francisco and attempt to have a special delivery of that opinion sent down. And I would request that your Honor go with me this afternoon to view the motion picture film. It's on exhibit right now.

THE COURT: Well, it's twenty minutes of 4:00, and I have to get home. I would be happy to do it under other circumstances.

Can you get a copy of the film Monday morning?

MR. McDANIEL: I'll have to have it done at the theatre because it's—it would be impossible for me to get a copy to come in here. I don't own the film or have any rights to the film. And I would make this observation: I would be satisfied, in terms of a viewing of the film, if your Honor were to see it over the weekend. I don't want to cut into your weekend. I know that's a problem.

THE COURT: We're going to be gone out of town all day Sunday. I've got a marriage to perform. I'm going to attend Judge Schaefer's party and the Trial Lawyers Association banquet in the evening. This weekend I just can't get away.

Well, I would suggest that you contact your attorney friend to make sure that it's sent down special delivery. I know that the San Francisco court will not send it down special delivery. If he sees to it, then we'll make sure that it's done.

Why don't you buzz him on the phone right now? In the meantime I'll excuse the jury.

MR. IMHOFF: Do you want me to reserve my objections?

THE COURT: Yes, if you would.

MR. IMHOFF: Until the record's before the Court?

THE COURT: Correct.

(There was held a recess.)

(The following proceedings were held in open court:)

THE COURT: The record will show that in the case of People versus Kaplan the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Ladies and gentlemen, you're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

We're going to have to have some additional out-of-the-presence-of-the-jury conferences and motions and arguments. And since this is Friday—you have been very, very good—we'll let you beat the traffic home.

You're excused at this time and ordered to return Monday morning—that would be February 1, 1971—at 9:15 a.m. without further order, notice or subpoena.

In the case of People versus Murray Kaplan, all parties and witnesses are excused at this time and ordered to report back Monday, February 1, 1971, 9:00 a.m. without further order, notice or subpoena.

Court will be in recess.

(Recess.)

LOS ANGELES, CALIFORNIA,
MONDAY, FEBRUARY 1, 1971
2:30 P.M.

(The following proceedings were held in chambers:)

THE COURT: In the case of People versus Murray Kaplan, the record will show the defendant is represented by counsel, the People are present and represented. The following proceedings are being held in chambers outside the purview of the jury.

Further, for the purposes of the record, the record will show that a number of instructions have been submitted by the People and the defense, that prior to going on the record we have culled through the large number of instructions for purposes of eliminating a number of them from consideration before arguing those that either the Court is prepared to accept or that the defendant—or that the parties think have been wrongfully rejected.

All right. With regard to the general instructions, I take it, nobody has any objection to the general instruction No. 1?

MR. McDANIEL: No.

THE COURT: All right. That will be given.

No. 2 and 3, I don't think anybody has any objection there.

MR. McDANIEL: No.

THE COURT: All right. They will be given.

No. 4 and No. 5. No objection?

MR. McDANIEL: No.

THE COURT: All right.

No. 7. It appears that there's no objection, as to the definition of direct and circumstantial evidence.

MR. McDANIEL: Okay.

THE COURT: All right. No. 9— let's see. 7 has been stricken without objection. No. 8 is being given. No 9, the instruction re witnesses and how to evaluate their testimony—

MR. McDANIEL: No objection to that.

THE COURT: That will be given.

All right. No. 10 and 11. No objection. All right. No. 12. No objection. All right. Those will be given.

Now, as to the mandatory instructions, to be given where applicable. No. 1, we have the presumption of innocence. No objection. No. 2 does not appear to be applicable. No. 3 is being given. All right. No. 4, we indicated there would be an argument.

The instruction reads as follows:

"You are not permitted to find the defendant guilty of any crime charged against him based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion and each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt has been proved beyond a reasonable doubt. Also, if the evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject the other which points to his guilt."

MR. McDANIEL: Now, with regard to No. 4, it is true, your Honor, that circumstantial evidence pervades a case such as an obscenity case in at least the following ways:

First of all, the material that's charged with being obscene itself is material which does not make direct evidence of obscenity or nonobscenity. There must be an inference made. The key inference in the whole case is whether they deduce from all the evidence that these materials are obscene or not obscene. And that itself requires an inference. It's, in other words, not directly provable by just looking at the material. That's one of the reasons that the Supreme Court set out requirements in Giannini, among other cases, which require that proof be made on various aspects and then that evidence has to be applied to these materials by inference. That's circumstantial evidence right at the outset of the case.

There's one other area where circumstantial evidence is clearly involved, as clearly as in that first instance, and that is in making an inference whether this man had the requisite scienter. Did he have knowledge of obscenity or did he not have knowledge of obscenity? That can only be inferred from testimony and from deducing or inferring things from what they've heard because there is no direct evidence before them that he had this knowledge at all. And so that's an inference again. It's completely abundantly clear that we have circumstantial evidence throughout the case.

MR. IMHOFF: Of course, we haven't decided yet on the issue of whether or not he had had knowledge of obscenity. We're supposed to get to that instruction, I believe, later.

THE COURT: Well, let's talk about that now because that is the one compelling argument that the defense makes which—

MR. McDANIEL: Excuse me. But even if it was the other thing of obscene character or just character,

that still requires an inference, so that—circumstantial evidence is clearly involved there. Whether the standard is what I say it is or whether it's not, I'm satisfied when we get to that that I can establish that the law in 1969 at the time of this alleged offense was—required knowledge of obscenity.

Counsel I don't think will disagree with that view.

MR. IMHOFF: Well, under the old statute on that issue, the courts never interpreted it to be that the defendant had to know that the material was obscene in the legal sense. In other words, he didn't have to know that it would be held obscene in a court of law. The courts have held that's an impossible standard, even under that old statute. And I think in Alberts versus California that was made very clear, that it would be an impossible standard. The cases under the old statute indicate that he has to have, you know, some knowledge of the contents of the material, or you can infer his knowledge from his actions, and so forth, you know, if we're going to apply that statute.

I'm not conceding that point, but I can cite cases which interpret the old statutes, and they do not say he had to know beyond a reasonable doubt it was this and they had to know beyond a reasonable doubt that it was that, and so forth.

THE COURT: Well, are you saying that scienter was an element?

MR. IMHOFF: Well, scienter was an element, yes.

THE COURT: He had to know that the character of the material he was selling—

MR. IMHOFF: Yes.

Well, under the present statute, it says that he has to have knowledge of the character of the material. I believe, under the old statute—

MR. McDANIEL: Just said knowledge of obscenity.

MR. IMHOFF: Yes, but the courts never interpreted that under the old statute to mean that he had to have actual knowledge that this material was obscene. If he had knowledge of some way of the contents of the material or if his—the way he did business, and so forth, indicated that he had knowledge that he was selling this kind of material, that was enough to satisfy that element.

THE COURT: Well, that would be circumstantial evidence.

MR. IMHOFF: Which standard are we going to apply?

MR. McDANIEL: Well, it's circumstantial either way is the point. You have to draw the inference either way.

THE COURT: See, you're showing the type of material that he had available in his store. You're going to impute from his statements that he had knowledge. What's his name?

MR. McDANIEL: Well, Don Shaidell is one of the guys.

THE COURT: Don Shaidell testified that he asked for sexy material, and he advised him what was within the book and the movie, et cetera. This, of course, leads to a conclusion, from what he says, that he knew, which would be circumstantial.

MR. IMHOFF: I think, though, in regard to this, as counsel—counsel made the point that if we apply the 1970 statute as it is now—that it might be an ex post facto application of the law. I believe you must apply the statute in light of the recent court interpretations of that statute.

I think there's one case that I call to mind that may be in point called In re Panchot which makes the point that the statute 311.2 must be interpreted in the light of the recent decisions.

So I have a serious question as to whether you apply the old statute, as far as scienter is concerned, or whether you apply the new statute.

MR. McDANIEL: Well, I'm just going to make the flat-out statement that if you apply a statute to this case which was enacted after the commission of the offense, the arrest and the complaint issued, you're walking into a sand trap which I don't think that the Court would want to walk into, and that is ex post facto application which is—

THE COURT: Well, we're going on the—

MR. McDANIEL: But as far as circumstantial evidence is concerned, it applies either way, see.

THE COURT: All right. It does appear that we do have a circumstantial evidence aspect on the question of scienter, frame of mind, knowledge. All right. I'm going to give the instruction.

No. 5, character evidence, has been deleted as not applicable.

No. 6, we do have the statements which may be an admission or confession. We have extrajudicial statements on the part of the defendant at the time. So I will give that instruction.

All right. We have the expert testimony instruction. I will give that.

Now, we had the question of—this is not a specific intent section, is it?

MR. McDANIEL: I believe it is, and I'm going to try to show that to your Honor. I've had this problem come up before and was able to establish that it has been classified as a specific intent-type offense.

MR. IMHOFF: I have had this come up before, too, and—in all the cases that I have tried, and the specific-intent instruction has not been given. I think if you read the statute, there's a section in the statute which talks about if he prepares or possesses with intent to distribute, and so forth. If that were the case, if he were just—had it in his possession, did not sell it or distribute, you'd have to prove specific intent to sell or distribute. But the statute goes on to say, ". . . or who distributes, exhibits," et cetera.

So the only specific intent part of that statute at all would be if you were being prosecuted for possession. I think this was put in there to take into account the Stanley versus Georgia decision which stated that mere private possession was not—could not be prosecuted as a crime. The statute was amended in '69, I think, to include that one particular section. But otherwise it's a general-intent crime.

MR. McDANIEL: The reason that it's a specific intent is because of the scienter requirement, basically, that he had to have the specific intent to violate, as shown, by having to have this requisite knowledge.

MR. IMHOFF: Well, of course, he only had to have knowledge of the obscene character of the material. And the courts have interpreted it that way in the past, even under the old statute, that he did not have to know it was constitutionally obscene or legally obscene. And I can—you know, we can go into cases on that, I think, if it's necessary.

THE COURT: All right. Well, what I can do is this: He must sell items which he knows—

MR. IMHOFF: Knowingly distributing obscenity. That's the three elements in this particular fact situation.

Now, the thing is—

MR. McDANIEL: There's also an intent to distribute which is—

MR. IMHOFF: Well, that doesn't apply, though, here.

MR. McDANIEL: Yes, it does.

MR. IMHOFF: Because he's not being charged with that, really. I mean, the facts indicate that he sold the material.

THE COURT: Okay.

I think what I'll do is this: In the crimes charged in Counts—there are three different counts, right? —I, II and III of the Complaint, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful.

All right. I'll give that instruction.

MR. McDANIEL: Well, that's not a specific-intent instruction, and I'd have to object. I want to show you one case on this point, 64 Cal. 2d 816

THE COURT: All right. I think we have a general intent situation.

MR. IMHOFF: Specific intent would be impossible to prove.

THE COURT: Well, let me see the statute or the authority that you have.

MR. McDANIEL: Here's one of the cases, Klor, Panchot.

Here's another point where it's clarified in Burroughs, or a specific intent such as that required under 311.2.

MR. IMHOFF: But, you see, the intent part, your Honor, applies to just what he has in his possession with the intent to do that. But the other—it says, prepares, publish, print, distribute, offers to distribute and —which means—or have in his possession with intent to distribute, and so forth.

MR. McDANIEL: In other words, you got the whole shotgun in your complaint here.

MR. IMHOFF: Well, what he actually did was distribute.

THE COURT: Mr. McDaniel, Mr. Imhoff contends that the statute is severable and that the People are proceeding on the first portion, to wit, "willfully and unlawfully and knowingly send and cause to be sent, bring and caught to be brought into the State for sale and distribution," as opposed to the second portion of the same statute which refers to "have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter."

MR. McDANIEL: Well, I might point out a couple of factors to your Honor.

First of all, there isn't any evidence purporting to be proof in this case at all that this man brought anything into the State. I don't know why that's—the point that I'm making, they've got a shotgun here. They just laid out every one of the terms under the charging language, and it's impossible to say what's going on because they obviously haven't proven each and every one of these things. I don't know which one they're going on. They haven't elected to clarify that. We demurred to that point in this case without success so that what we're faced with now is a general reading of the statute. And the holdings of the Appellate Courts on intent with regard to 311.2 are clear that it's a specific

intent. That's what both Burroughs and the other case that I handed up, In re Klor, discuss. One's California Supreme Court. The other's Appellate Court.

MR. IMHOFF: We can allege the language of the statute. That's perfectly clear by all the cases. And you don't have to prove that he did all of those things. If you prove that he did one of them, you've proved that he violated the statute, if he exhibited or if he distributed, or whatever he did. And so we have proved that he distributed obscene material which is a crime under the statute. It's not necessary to—you can strike the other language of the complaint based on what the evidence shows, I suppose.

MR. McDANIEL: Well, I don't think that it's proper to strike the language of the complaint after the trial is 90 per cent over with. I'd object to that.

MR. IMHOFF: Well, after the evidence is in, whatever the evidence—whichever offense in that statute has been proved. That's the only part that's applicable.

THE COURT: Well, the language of Burroughs, footnote 2, in the interpretation of Penal Code Section 311.2, relating to preparation of obscene matter for distribution, which requires that such preparation be with a specific intent that the material shall be distributed or exhibited, is based on constitutional requirements, et cetera, reading the actual language.

MR. McDANIEL: The specific intent to distribute which has to be proven, and that's one of the elements of specific intent. The other, of course, is the scienter requirement.

MR. IMHOFF: If we were just going on the theory that he possessed it with the intent to distribute, we'd have to probably prove specific intent, but he actually

distributed. And that's the section of the statute that he's guilty of. He distributed the material. There's no specific intent involved there. It's only when you have private possession you have to show an intent to distribute or exhibit, but not when you have actual distribution or actual exhibition of the material, which, I think, the evidence clearly shows.

THE COURT: Well, for sale and distribution, isn't a specific intent—it is a specific intent, is it not?

MR. McDANIEL: It is.

THE COURT: To bring into the State material "for sale and distribution" is a specific intent, is it not?

MR. IMHOFF: Yes, or in this State prepare, publish, print, exhibit, distribute, offer to distribute or have in his possession with intent to distribute, to exhibit, and so forth. The State's case is in this section of the statute; he prepared, published, printed, exhibited or distributed. Okay. He distributed. Any one of these thing constitutes the crime or an element of the crime. So when he actually distributes, there's no requirement of specific intent. He's done the act. It's only when you have possession with nothing more that you have to prove specific intent, as I interpret it.

MR. McDANIEL: That isn't the way the cases interpret it.

THE COURT: This is 311.4 in the Burroughs case.

MR. McDANIEL: What they're talking about is comparing it with 311.2. They're trying to figure out if the intent was the same in 4 as it was in 2, and I think they found out there were different considerations in 4 as in 2. It was a minor-type deal.

THE COURT: Reading the language of People versus Burroughs on 231, fourth paragraph down, the

California Supreme Court has held—and it cites the Klor case—that in a prosecution under Section 311.2 the words prepares, publishes, prints, exhibits, distributes or offers to distribute, as used in the statute, must all be read as modified by the words "with intent to distribute or to exhibit or offer to distribute." This construction of Section 311.2 was adopted partly because the statute could not constitutionally proscribe the mere preparation of obscene material without any intent to distribute it.

An alternate ground of the Supreme Court's holding in Klor was that the language of 311.2 indicates that the same result was intended by the legislature. Thus, there is no violation of Section 311.2 unless one prepares, publishes, prints, et cetera, the obscene material with the intent to distribute it.

MR. IMHOFF: Yes, your Honor. They talk there about prepare, publish or print. You have to have the intent, but not if you actually distribute or exhibit.

THE COURT: Well, it indicates here, distributes or offer to distribute, as used in the statute, must all be read as modified by the words "with the intent to distribute or to exhibit or offer to distribute."

So there you are, right there.

MR. IMHOFF: May I see it before you—

THE COURT: Okay. I'll give the specific intent—

MR. IMHOFF: Well, would you wait? I would like to make a phone call, if I could, on this point before you decide because—

THE COURT: All right.

(There was held a recess.)

(The following proceedings were held in open court:)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Ladies and Gentlemen of the jury, you were advised this morning we were going to have a short conference but we would resume the trial. It is true you have been here all day, and the Court will apologize for your inconvenience. By way of explanation, we discussed various ramifications of presentation to be made. I think we've succeeded in cutting down that to a minimum. And we have been going over jury instructions. There are some very sophisticated problems that are presented in this particular matter, and I don't want to go into any specific details. We're going to have to iron out a few more matters, and I don't see how we'll be able to get any further along in the presentation to you today.

Therefore, I'm going to excuse you early at this time and order you to report back tomorrow at 9:15 a.m.

Counsel, would you agree that we will proceed at that time?

MR. McDANIEL: Yes. There will be no problem.

THE COURT: All right. We will do all we can to proceed at that time.

You're admonished that you're not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion thereon until the matter is ultimately submitted to you.

I might further advise you that we have had to go down to the fifth floor library to obtain volumes that we do not have in the library in chambers. That may explain some of the scurrying back and forth that you've observed.

All right. Again, you're admonished not to discuss this matter among yourselves nor with anyone else, nor are you to form or express any opinion on the matter until the matter is ultimately submitted to you. You're excused at this time and ordered to report back tomorrow morning, February the 2nd, 1971, at 9:15 a.m. without further order, notice or subpoena.

(The following proceedings were held in chambers:)

THE COURT: Were you able to complete your call?

MR. IMHOFF: Yes. I just—my position on this matter is still the same. I think if you look at the statute now you will find that the language has been somewhat rearranged so that the distribution part in the statute comes after that intent part. I think the legislative intent in here is not to apply specific intent to someone who possesses—the Klor case was a case of possession. And I think when the Court here in this case, the Burroughs case, talks about the intent, they're really talking about when you possess, prepare, publish, and so forth, and nothing more. When it's actual distribution, the intent is sort of moot. I mean, it's—doesn't apply.

THE COURT: Well, of course, we have to interpret the statute as it existed at the time of the offense. And as a consequence, I am going to give this instruction.

All right. In the crime charged in Counts I, II and III of the complaint, there must exist a union or joint operation of act or conduct and a certain specific intent. In the crime of—

MR. McDANIEL: Disseminating obscene material would probably be—

THE COURT: You're charging him with distributing obscene material?

MR. IMHOFF: Yes. He sold it, which is distributing.

THE COURT: Selling or distributing obscene material—there must exist in the mind of the perpetrator the specific intent to—

MR. McDANIEL: I think you could go to my instruction on that point.

THE COURT: All right. —specific intent to distribute or to exhibit or to offer to distribute said material, and unless such intent so exists that crime is not committed. All right.

So that means I'll give that.

I'm deleting 9. I'm giving 10. I had indicated earlier that we were going to give 9, which is the general intent, but we're deleting general intent. We'll give the specific intent which is 10.

MR. McDANIEL: How does that one go?

THE COURT: That reads: "The specific intent with which an act is done may be manifested by the circumstances surrounding its commission. But you may not find the defendant guilty of the offense charged"—I'm making it "offenses charged"—"unless the proved circumstances not only are consistent with the hypothesis that he had the specific intent to distribute or to exhibit or offer to distribute said material but are irreconcilable with any other rational conclusion. Also, if the evidence as to such specific intent is susceptible of two reasonable interpretations, one of which points to the existence thereof and the other to the absence thereof, you must adopt the interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to such specific intent appears to

you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable."

All right. Now, that bears on this previous instruction, because the reason we gave the circumstantial evidence instruction was on the question of intent. So—

MR. McDANIEL: Well, also on the material, too.

THE COURT: On what?

MR. McDANIEL: On the material, too. I think it still should have to be given, properly. Both of the instructions are somewhat similar, but the point of each is somewhat different. And I think both of them have to be given.

THE COURT: All right. We're giving the instruction as to the distinction between circumstantial and direct evidence.

I'm going to delete 4 and give it in 11.

MR. McDANIEL: What's 4?

THE COURT: 4 is the instructions with regard to general guilt, circumstantial evidence.

MR. McDANIEL: Well, I think that has to be given. If you're going to make a choice, I would ask that that be given and the other one be deleted because it's more important.

THE COURT: See, this is specific. The other is general.

MR. McDANIEL: But the other is on interpreting circumstantial evidence, don't you see? That is a really considerably different point, you see.

THE COURT: All right. I guess in the—as a super abundance of caution, I better give them both.

MR. IMHOFF: Well, they're sort of repetitive, aren't

THE COURT: Yes.

MR. McDANIEL: But they're on different points.

MR. IMHOFF: I don't think it's necessary to give both.

THE COURT: Well, the other is a general instruction as to circumstantial evidence, and that is specifically as to a question with regard to circumstantial evidence as it bears on the issue of intent.

Well, 4 is mandatory so I have to give it. Okay. I'll give it.

MR. McDANIEL: Let's go on to this knowledge of obscenity thing and get that clarified once and for all. That was in his instruction.

THE COURT: Let's go on—what did I do here? That concludes our mandatory and our generals. All right.

MR. McDANIEL: Okay.

Then, we'll go on to prosecution instructions.

THE COURT: All right.

Now, we go to plaintiff's proposed instruction No. 1:

"You may have, during the course of this trial, heard arguments or testimony, or read statements which were contained in exhibits which were admitted into evidence, which purported to declare what the law is or should be with respect to the legal definition of obscenity, or which purported to have some bearing upon this question of law. You may also, prior to this trial, have read articles or heard statements or arguments in regard to what the law of obscenity is or should be.

"I instruct you that the law in regard to any question involved in this case is only that which I give you in these instructions, and you are to disregard completely and totally ignore any statement, argument or

contention concerning matters of law which you may have heard, seen or read or otherwise become aware of from any source other than these instructions."

MR. McDANIEL: Your Honor, I offer to modify this instruction by eliminating the first two complete sentences so that it would start off with, "I instruct you that the law"—because that paragraph or that sentence, rather, properly tells the jury that they're to disregard other viewpoints of law than what they get out of the instructions, and that would eliminate the ambiguity of the first part of this instruction. It covers the important point that way and leaves out the questionable material. That way, it would read, "I instruct you that the law in regard to any question involved in this case is only that which I give you in these instructions, and you are to disregard completely and totally ignore any statement, argument or contention concerning matters of law which you may have heard, seen or read or otherwise become aware of from any source other than these instructions."

THE COURT: That would certainly cover the whole gamut, wouldn't it? Okay. I'm going to delete the portion before "I instruct you that the law," et cetera.

MR. IMHOFF: The part before that, the whole thing?

THE COURT: Yes. I think that also covers your point here and No. 6, so I'm going to reject yours.

MR. McDANIEL: Well, actually, that's different than what the law is. I think that one has to be given, your Honor. The point of that instruction is that they're to put out of their minds any subjective feelings that they may have about the material which could be kind of involved in their deliberations. It's a little bit different than erroneous knowledge of law or knowledge of erroneous law.

MR. IMHOFF: I think it's made clear in the instructions that they're to follow the law as the Court gives it, and that's all they're supposed to determine. And I don't like these negative instructions to a jury; you're not to do this and not to do that.

THE COURT: All right. I'm rejecting your No. 6, and I'm modifying plaintiff's 1.

MR. IMHOFF: You cut out the whole first part except down to where "I instruct you"—

Is that correct?

THE COURT: Right.

Okay. Now, we have plaintiff's proposed instruction No 2 which appears to be the definition as contained in 311.2—

MR. McDANIEL: Yes. I didn't object to that one.

THE COURT: All right. That will be given.

Plaintiff's 3, definition of "knowingly."

MR. McDANIEL: Now, this instruction would have to be modified to fit what the law is. The first thing I'd suggest is this: "You're instructed that Section 311(e) defines 'knowingly' as follows: 'Knowingly' means having knowledge of obscenity of the matter."

That's what the law was in '69. And then subsequent, going on from that, I have some objection to the language of definition here which I think I can clarify. I think that, to meet the Supreme Court requirements, this definition material would be proper if you added, at the first point where it says that it be established that defendant knew the character—if you added if it be established that defendant knew the contents and the character of the material here in question.

And then down further, the next sentence down, you get a repetition of the same thing which is defendant had knowledge of the character. If you add knowledge

of the contents and character of the materials, then I think that the instruction would lie.

Do you understand what I'm doing? Merely adding "contents" where the "character" is because the Supreme Court's cases have—although it's in opposition to the actual view I have that that doesn't establish knowledge of obscenity. I think that the instruction could come in if it had "contents" added wherever "character" is read. Even though I would object to that for the record, I would point out to your Honor it is the type of instruction that has been considered all right by the Supreme Court.

MR. IMHOFF: Have you decided yet, your Honor, which you're going to apply, as far as "knowingly" is concerned? Are you going to apply the definition of the statute in '69?

THE COURT: Well, we have to because we're proceeding under the statute.

MR. McDANIEL: I would think the best way to do it, actually, would not be to explain it, just: "You're instructed that 311(e) defines 'knowingly' as follows: 'Knowingly' means having knowledge of obscenity of the matter," period.

MR. IMHOFF: I won't—if you're going to apply that, I would object to that because the courts have not interpreted, under the old statute, that he had to know that the character was actually obscene. They have held that that's an impossible standard. And I can—if we're going to apply that statute, I think we should apply the one now because I think we have to apply the law as it's been interpreted by the courts now as to what, you know, knowledge means. And knowledge merely means being aware of the character of the material.

MR. McDANIEL: Well, let me respond to that briefly, though, because the point I'm making, as I said before, is in their definition language—if you intend to use it, you get past a real valid constitutional objection if you add "contents" wherever "character" is, because that's what the Supreme Court has held. I think that that is—that explanatory material is not good and that it confuses rather than aids the jury.

THE COURT: Instead of "character," "contents"?

MR. McDANIEL: "Contents and character."

MR. IMHOFF: Let me hand the Court another instruction in regard to this which would be applicable under the old law, I believe. We may put something together here if you—

MR. McDANIAL: I won't object to this.

THE COURT: All right. We'll put in the proposed number 3 in place and stead of the old one. I'll give that. I'll return this one to you.

Or do you wish me to include this as one of the rejected—

MR. IMHOFF: I was just thinking, if we could modify my new one in some way to get some of the language in—

THE COURT: Of what? The one you've submitted is your—"You are instructed that 'knowingly' means having knowledge that the matter is obscene. By 'knowingly,' is meant that the defendant must have known the contents of the material, and must have been in some manner aware of its obscene character. This requirement does not mean that the defendant must know that the matter would be held obscene by a court of law."

MR. IMHOFF: Yes, But now, as far as knowing the contents of the matter, that doesn't mean that he

had to know everything that was in the material. In other words, he didn't have to read the book or see the whole film or anything else. I mean, the courts have interpreted it to mean that he—you know, by other evidence, it can be inferred that he had knowledge of the contents of the material.

THE COURT: Well, that would be argument. You can argue that under this instruction because it says "must have known the contents of the material" and "must have been in some manner aware of its obscene character."

MR. McDANIEL: You can argue from that.

THE COURT: From his statements you have—from the statements that Shaidell has indicated he made, you see—

MR. IMHOFF: What I'm trying to point out is under the old law the courts did not—as defense tries to put in his instruction here that he had to know beyond a reasonable doubt that it was—you know, went substantially beyond customary limits of candor or—one of the instructions that defense counsel submitted, he states that the defendant must know beyond a reasonable doubt that the material appealed to a prurient interest, et cetera, the other two elements of obscenity. And that was not the law under California law.

THE COURT: Well, we'll get to that when we get to his instructions.

All right. Do you want to return your previous proposed 3 and substitute—

MR. IMHOFF: All right.

THE COURT: All right. Plaintiff's proposed instruction 4.

Now, here's where there are a couple of appendages by the defense.

"You are instructed that 'obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, that is, a shameful or morbid interest in nudity, or sex, or excretion which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

MR. McDANIEL: Now, you see, your Honor, I don't have any objection to that. But I think, to clarify it, my instruction has to be given also, because it isn't clear from that instruction that they're separate and independent tests.

MR. IMHOFF: I think there's language in the case—I don't recall the case offhand where it states that these elements—you can't balance one element against the other. They must coalesce. I think if we get that instruction in here it would be much more brief and explanatory than going into a big long instruction that—what case is that?

MR. McDANIEL: Well, Jacobellis is the main one.

MR. IMHOFF: Yes, where—

MR. McDANIEL: The simple point is that the language—

I'm sorry, if you're going ahead, Counsel.

MR. IMHOFF: I was just going to say that I think the law is that you can't balance redeeming social importance against the other elements.

That's the point you're trying to make, right?

MR. McDANIEL: No, that's not the point I'm trying to make. The point I'm trying to make is simply that the Supreme Court has held consistently that each one of these three tests, customary limits, prurient

interest, social importance—these are separate and independent tests before material can be found obscene. All three of those elements must be found to be present beyond a reasonable doubt, not just two of them. Any given two of them would not be sufficient. That basically was the reason that the Supreme Court reversed in Memoirs against Massachusetts, because there they tried to balance the social importance against the prurience.

MR. IMHOFF: I agree that you have to prove these three elements of obscenity in order to prove that it's obscene. In other words, if it has any redeeming social importance, even though it may appeal to a prurient interest or go beyond contemporary community standards, it cannot be held to be obscene, or if it doesn't go to prurient interest. I would agree that's true. But I would object to this long dissertation here.

MR. McDANIEL: It's not really that long. I mean it reads pretty—read it aloud and you'll see that it really does cover—I mean it carries the ball properly, in my judgment.

THE COURT: Well, I will give plaintiff's 4 and—with the material that follows. I think we're going to cover the subject matter contained in 3 and 4. Therefore, I'm going to reject defendant's 3 and 4 as repetitious.

MR. McDANIEL: As long as that's—covers that these are independent tests, I don't care how it's stated, as long as the point is gotten out to the jury in the instructions that all three of these are separate and each has to be proved, and the material can't be obscene unless all three are proved. That's the only point I'm trying to make with those things. And if it's made

somewhere, I don't care how it's made. But I have to argue from that basis.

THE COURT: All right.

Now we're on plaintiff's 5 and 16.

MR. McDANIEL: Now, I have a specific objection to No. 5, and that is simply this, your Honor—

THE COURT: All right.

MR. McDANIEL: —that the Penal Code itself defines prurient interest in a very limiting fashion, that is, a shameful or morbid interest in nudity, sex or excretion. The legislative intent is clear by their not adding other descriptive words. They have limited the definition of prurience to a shameful or morbid interest. I think it's improper to go on and add a bunch of other adjectives to allege that they're synonymous to shameful and morbid, when, in fact, the Penal Code itself has specifically excluded—they could easily, if they wanted to say it, have added: i.e., unwholesome, shameful or morbid interest. And they left that word out, disgraceful, unwholesome, indecent—we have a very limiting statute here. The theory of that is to keep the door against First Amendment violations as closed as possible. And there's all sorts of language in Supreme Court cases to that point.

But here what happens by an instruction like plaintiff's 5 is simply that then the work of the legislature in narrowly defining this, which was the reason their statute was upheld, some of these Supreme Court cases, because they didn't have this extra verbiage—for instance, by way of analogy, in the Federal Code Title 19, I believe, Section 1461, which is the basic obscenity section as applies to Federal mail order prosecutions, it includes obscene and then a whole series of other words, lewd, and so forth. And that is always

given with an instruction in a Federal case, that all those words are merely verbiage; that they don't mean anything other than obscene itself.

And so what this does is it improperly expands the scope of what material could be classified to be prurient in a way that the legislature and the constitutional interpretation thereof of the section enacted by the legislature is opened up to a wide ambit than what it actually is legally opened up to.

THE COURT: All right. Here's what I'm going to do.

I'm going to give this as stated:

"You are instructed that in the definition which I just read to you the following phrase is used: 'the predominant appeal of the matter taken on a whole is to prurient interest, that is, a shameful or morbid interest in nudity, or sex, or excretion.'"

I'm going to add the following language from your 16:

"Under the law herein, a prurient interest is only a shameful or morbid interest in sex, nudity or excretion, as distinguished from a candid and normal interest in sex, nudity or excretion."

And then I'll go on and give the balance of these.

MR. McDANIEL: Okay. Fine.

MR. IMHOFF: I think, if I'm not mistaken, in line 3 of my 5 that should be "taken as a whole" instead of "on a whole."

MR. McDANIEL: Yes, he's correct. I would stipulate that it should be "as a whole," "the predominant appeal of the matter taken as a whole."

THE COURT: All right.

MR. McDANIEL: And also the "or" between "nudity" and "excretion" should be eliminated. It's just nudity, sex or excretion.

THE COURT: Strike the "or." All right.

Now, I'm going to give your modified defendant's 7 for "substantially," which reads:

"The word 'substantially' has been defined as greatly or considerably or largely."

MR. McDANIEL: Okay.

THE COURT: Okay.

Now, plaintiff's proposed 6.

MR. McDANIEL: I believe that I didn't have an objection to 6. Yes. I don't object to that.

Did I have one of my own on that?

MR. IMHOFF: I don't think you did.

THE COURT: All right. I'll read the whole thing, plaintiff's proposed 6:

"The average person is, of course, a hypothetical person. The phrase means a person with an average interest and attitude toward sex; not a libertine and not a prude, not a person who is preoccupied with sex and not a person who rarely, if ever, thinks about sex; not a person who thinks sex is the most important thing to be discussed and not a person who thinks sex should never be discussed. The phrase means a normal individual of average sex instincts; not one who is undersexed, not one who thinks sex is the most important factor in life, and not one who is afraid of sex or ignorant of sex or bored by sex. In short, the phrase 'average person' means a normal, healthy, average adult man or woman with normal, healthy, average attitudes, instincts and interests concerning sex."

And the defendant's proposed 22 says:

"The appeal of the material involved herein must be measured only by its appeal to the average adult person."

I think that's covered so I'm going to give plaintiff's

6. I'm going to reject defendant's No. 22 as being repetitious.

MR. McDANIEL: Let me just note for the record, if I may, objection to that rejection and also note a continuing objection wherever the Court rejects a preferred defense instruction. I'd like the record to reflect that we object to that for the record.

THE COURT: The record will so show.

Okay. Now, we have plaintiff's proposed 7:

"You are instructed that the term 'utterly without redeeming social value' means that the material has no literary, scientific, or artistic value in its depiction of sex or nudity."

MR. McDANIEL: That I object to specifically, your Honor. That, again, is a formula, a negative-type obstruction, because the advice of it is simply that it goes from a term to then talking about the material charged.

What I think would be proper would be merely a definition of the term "utterly." And that term has been defined as meaning absolutely or totally. I think the rest of this is wrong. So I think a definition of "utterly" is in order. But I think that this type is repetitious, formulistic, and prejudges.

MR. IMHOFF: I think it's a state of the law, your Honor.

THE COURT: Well, what I'm going to do is I'm going to give both plaintiff's 7 and defendant's modified 23, which says:

"Material has social importance if it has the capacity to broaden man's range of sympathies or consciousness, or to enable him to see, hear or appreciate what he might otherwise have missed, or deepens his emotions, or makes life seem richer, more interesting or more com-

prehensible, or offers entertainment, or provides insights into man's relationship to the society in which he lives."

MR. IMHOFF: I think that's merely dictum, isn't it, from a case? I mean, it's not—it's an argument from a case, you know, reasoning. I don't think—the law, especially the part about entertainment—I don't think that's the law.

MR. McDANIEL: Yes, it is. It's been held by the Supreme Court in many cases; entertainment is sufficient.

MR. IMHOFF: That means different things to different people. I mean, when you talk about entertainment—I would object to that instruction being given as not a correct statement of the law.

THE COURT: All right. Your objection is noted. The Court will give both together on the question of utterly without redeeming social—

MR. McDANIEL: Your Honor, let me interject, if I may. I've written out one more, which is defendant's 63, which I'd offer in to consider at the same time. Defendant's 63 reads:

"You are instructed that the term 'utterly' as used in these instructions has been defined as totally or absolutely," because there isn't any definition yet of the term "utterly" that's before us.

MR. IMHOFF: I believe the courts have said, though, that all material may have some social importance, you know, very slight. That doesn't mean it's redeeming social importance.

MR. McDANIEL: Well, that Counsel, is exactly the point that Memoirs against Massachusetts was reversed on, where they said—the Massachusetts Supreme Court held that there was some slight social im-

portance to the work in question, and therefore, in balancing that, that slight value went out the window, and they held that that's wrong; that the term "utterly" means what it says; and if there's any value at all, it can't be found obscene. And I think that "utterly" has to be defined. The dictionary definition is totally or absolutely.

MR. IMHOFF: What dictionary?

MR. McDANIEL: Well, I'll rely on whatever dictionary is in the judge's chambers here.

THE COURT: It does seem like that might be—the clerk has a dictionary.

MR. IMHOFF: I took mine out of the Third Webster's International—

THE COURT: Your term "utterly without redeeming social value"—

MR. IMHOFF: And that's what the law says, no literary—

THE COURT: —which means totally or absolutely.

MR. IMHOFF: As long as we're on social value, I told you I had one that was being typed up that I didn't have that I wanted to submit, and I'll do that as soon as we're through with this.

MR. McDANIEL: Here we have "utterly" defined as in an utter manner, entirely, completely, absolutely.

THE COURT: Okay. Well, I think that's reasonably set forth. All right. What is the other one you have?

MR. McDANIEL: I would object strenuously to this. This is some kind of argument and legal jargon which—

THE COURT: Expert evidence is required by the prosecution—I think it's a misstatement of the law.

MR. IMHOFF: Not on redeeming social importance.

THE COURT: Well, when you're talking about obsencity, you are of necessity including, as a subelement, the possibility or lack thereof of social importance, so—

MR. IMHOFF: Well, if you'll read People versus Newton, it states that when the People have put on expert testimony, as to the first two elements of the offense, then it's the burden of the defense to go forward with evidence on redeeming social importance.

MR. McDANIEL: Well, your Honor, that was a procedural decision, and it's not—it contradicts Giannini, to begin with. It also contradicts what the Supreme Court has held which is that all these elements have to be proved. You don't get by without proving it. And the legal presumption, again, is that the stuff's not obscene. So I don't know where they get off by saying that they don't need to prove it, you know. They got to prove the elements of their crime.

MR. IMHOFF: I would ask the Court to read those cases before making a decision.

MR. McDANIEL: I'll submit that if that instruction were given it would be reversible error.

THE COURT: Well, 9 Cal. App. 3d, Supplement 24—well, this is the language of the decision on the point: "While the burden of persuasion as to lack of redeeming social value is on the prosecution, where the other elements of obscenity exist, the burden of going forward should be, and we feel is, on the defendant."

It is interesting to note that there was no evidence of lack of redeeming social value. While this fact was commented upon by the court in footnote 5, it

was not one of the elements, proof of which the court found required expert testimony.

"We feel that the police reports themselves contain sufficient material to compel the defense to go forward with a showing of the possible existence of some factor of social value."

MR. McDANIEL: The problem is that this instruction goes against what the actual requirement is, that they have to prove all of their case. And, in the first place, that's on some kind of a motion. It's on a submission on police reports, and so forth. We've got a full-blown jury trial here with live testimony, and so forth. It's just a completely different situation.

THE COURT: The evidentiary burden would be the same, whether it would be a court or jury trial.

MR. McDANIEL: Of course, the point is that, first of all, they don't specifically hold that. They rely on Giannini. And Giannini doesn't decide whether expert testimony is required on social importance or not. They just don't decide that point. They decide on the other two points and leave that one undecided.

MR. IMHOFF: Nobody is an expert on redeeming social importance.

MR. McDANIEL: That may or may not be the case. I think there are experts. I used one as an expert on the—

MR. IMHOFF: You can bring somebody in, maybe, who's an expert on literature, if you're doing a book; and he could testify. But he doesn't have to be an expert, I don't think, on that issue. And so—the instruction can be reworded if it's not consistent with the language of the case.

THE COURT: Well, I'm going to give plaintiff's 7 in conjunction with defendant's modified 23.

MR. McDANIEL: And a definition—

THE COURT: Plaintiff's 7A. And defendant's 63—

MR. McDANIEL: Your Honor, with regard to that that you're calling 7A, then there's going to have to be added something else because there's something that's clearly left out. It says that you're instructed that the burden of persuasion, et cetera, is on the prosecution. However, the burden of going forward is on the defense. That's not correct. What the case says, that if those other elements are established—and you'd have to add, beyond a reasonable doubt—then the burden of going forward is on the defense. That's not in the language of this instruction. And so what this does is it presumes that they've proved that when that's not the case at all.

It's up to the jury to decide whether they've proved that or not.

Do you understand the point I'm making?

MR. IMHOFF: It says, where the other elements of obscenity exist. It doesn't say they have to be proved beyond a reasonable doubt, but if they exist, the burden of going—the burden of going forward should be on the defendant.

Now, we have certainly introduced evidence upon these two points, expert testimony on those first two elements of the obscenity statute of prurient appeal and community standards, and—

THE COURT: We've given the elements in other instructions. We're just merely talking about this one factor.

All right. I'm going to give plaintiff's 7, defendant's 23 modified, plaintiff's 7A and defendant's 63 on this question of utterly without—

MR. IMHOFF: Which is 63?

THE COURT: That's the defendant's definition: "You are instructed that the term 'utterly' as used in these instructions has been defined as totally or absolutely."

All right. Now, let's go on to 8.

"All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinions —have the full protection of the guarantees of freedom of speech and press unless excludable because they encroach upon the limited idea of more important interests. Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Obscenity is not within the area of constitutionally protected speech or press.

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any constitutional problem. These include the lewd and obscene. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them are clearly outweighed by the social interests in order and morality.

"Sex and obscenity are not synonymous. The portrayal of sex, that is, in arts, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. On the other hand, obscene material is material which deals with sex in a manner appealing to a prurient interest."

MR. McDANIEL: Now, to object to this, it's basically just a bunch of argument. It misconstrues all the tests, says, "slight social value." That's obviously—

THE COURT: I'll refuse that.

MR. IMHOFF: Well, this was right out of Roth, your Honor, the leading case on the area of obscenity.

THE COURT: It is argumentative.

We've included all the instructions with regard to redeeming social importance, anyway. It would be repetitive and argumentative.

MR. IMHOFF: I believe this case indicates, your Honor, that some things may have a slight social importance but they're not protected.

MR. McDANIEL: That's not what the law is. Again, read Memoirs against Massachusetts, and it clarifies it. 383 U.S.

THE COURT: All right.

No. 9:

"You are instructed that for the purpose of determining the obscenity of the material here in question, the relevant community is the entire State of California. The People must prove, by expert testimony, that the predominant appeal of the material in question, to the average person applying contemporary standards, is to prurient interest, and substantially exceeds customary limits of candor in description or representation of nudity, or sex, or excretion."

MR. McDANIEL: Objection to this one. That's repetitious. You've already indicated that the relevant community is the State of California. We already know that this other part of it is completely out of place here. It's not a meaningful instruction.

MR. IMHOFF: I don't think we have any previous instruction on the relevant community, do we?

MR. McDANIEL: I would be willing to have this given by just going through as follows:

"You're instructed"—stopping at "California," eliminating the rest of it.

MR. IMHOFF: Well, this is a statement of the law taken from In re Giannini, your Honor.

MR. McDANIEL: No, it's not. I don't have any quarrel with it up to the end of the sentence, "the entire State of California." The rest of it is just—

THE COURT: We have given the expert-testimony instruction.

MR. IMHOFF: I don't recall.

THE COURT: Yes. We have one saying expert testimony has been presented to help you with—

MR. IMHOFF: Well, that—I think that instruction defines an expert and how you weigh his testimony.

THE COURT: Right.

It does appear to be repetitious.

MR. IMHOFF: Well, we don't have an instruction on the relevant community which is the State of California.

MR. McDANIEL: Maybe you ought to just give it down to the end of the sentence "State of California" and stop there, eliminating the rest of it. That much is proper. I believe he may be correct that there wasn't that part given previously.

THE COURT: All right.

MR. IMHOFF: I would object to the deletion of the remainder of the instruction. I think its the proper instruction under the law—in the case of In re Giannini, I—

THE COURT: Well, haven't we already said that —I can't recall. Haven't we already said something about the expert testimony?

MR. McDANIEL: Yes, you have. The point that I was saying is to make—

MR. IMHOFF: That was in regard to redeeming social importance, I believe.

MR. McDANIEL: No. It was also on expert testimony. That has been given, the whole business on that. The point is that the relevant community is the entire State of California. There's no quarrel about that part of it. The rest of it is superfluous, repetitious and not proper.

THE COURT: All right. I'm going to strike "the People must prove, by expert testimony," et cetera.

MR. IMHOFF: And my objection will be noted in the record?

THE COURT: So noted.

All right. Then you have submitted—that would be repetitious. I'm going to reject defendant's proposed instruction No. 8.

MR. McDANIEL: I object to that rejection.

THE COURT: Now, you've submitted a better instruction of "utterly" than you did before. Here you say, "Under the law, the word 'utterly' has been defined as follows: To an absolute or extreme degree; to the full extent; absolutely; altogether; entirely; fully; thoroughly; totally," which, I think, is better.

MR. McDANIEL: I'll—

You think this one's better here?

THE COURT: Yes.

MR. McDANIEL: Okay.

THE COURT: "The word 'redeeming' in the context herein—

MR. IMHOFF: I think that part is totally confusing.

THE COURT: Well, we already have "redeem-

ing," so I will strike that portion. I much prefer this definition—I'm going to give that as modified.

And I will return to you this 63.

MR. IMHOFF: What number is that one?

MR. McDANIEL: 24.

THE COURT: That's defendant's 24.

MR. McDANIEL: I'll withdraw 63.

THE COURT: Okay.

Now, we're going to rewrite this?

MR. McDANIEL: Defendant's 12.

MR. IMHOFF: Which one is that?

THE COURT: The comparison with other contemporary matter. All right. So we'll hold that in abeyance.

Incidentally, I want to insert 2.60 and 2.61 in its appropriate position.

All right. Considering defendant's proposed 25 and 26, both will be rejected as formula and argumentative.

MR. McDANIEL: Well, I want to argue, for preservation of the principle involved, that the Supreme Court of this State has determined that the scope of 311.2 of the Penal Code is limited to materials that are hard-core pornography and nothing more. That's a specific holding by the Supreme Court. It adds considerably to the definition of what this statute is intended to apply to, and it's, I think, incumbent upon your Honor to give what the definition of what that statute reaches to the jury. I don't care if this language needs to be revised in some fashion. But it is true that hard-core pornography has been held as the only material that can be found obscene under this section. And I am entitled to that authoritative interpretation by the State Supreme Court.

MR. IMHOFF: I would disagree that that's the

present state of the law, your Honor. I think that—I believe the second part of the instruction is just a definition of hard-core pornography given by—

MR. McDANIEL: Justice Stewart.

MR. IMHOFF: I would disagree that that's the present state of the law, your Honor. That certainly has been eroded, if it ever was the law. And the test of obscenity is what the Supreme Court has said it is. And it's the Roth test, and you have to apply that particular test to every particular work, and—

THE COURT: We've given them a definition of what is pornography, et cetera, et cetera, et cetera. And I think this is just repetitive and argumentative.

MR. McDANIEL: Well, could I phrase that in such a way that it would get past the argumentative? Just "You're instructed that this law prescribes only hard-core pornography," period, because that is the law. It's never been overruled. That's Zeitlin versus Arnebergh, specific holding by the California Supreme Court. That is the legal test in this State, and it has not been overruled by the California Supreme Court or any other court.

MR. IMHOFF: The legal test, I believe, is the statute itself, your Honor, and—

THE COURT: Well, you may submit an instruction tomorrow morning. But if you don't do it by tomorrow morning—tomorrow morning these instructions will be finalized.

MR. McDANIEL: I will rewrite an instruction on that tonight, your Honor.

THE COURT: I'll consider it, but I'm not making any advance statements as to what I will do.

All right. Now, we have defendant's proposed 29.

"The statute under which this prosecution is con-

cerned requires knowledge by the defendant that the material named in the complaint was obscene at the time it was sold."

I think we've already said that.

MR. IMHOFF: We've got past that.

THE COURT: So this will be rejected as repetitive.

Now, we have 41:

"Freedom of speech and of the press guaranteed by the Constitution embraces all information and education with respect to the significant issues of the times, embraces all issues about which information is needed or appropriate to enable the members of society to cope with the problems of their period."

MR. IMHOFF: I think that's irrelevant. I think that we should reject it on the same reasoning that you rejected my instruction on constitutional standards, and so forth. It's argumentative.

MR. McDANIEL: It's not argumentative at all.

THE COURT: I'll give that one.

MR. McDANIEL: Thank you.

THE COURT: It's just a definition of what's covered by freedom of speech as it applies to these matters. It's all encompassing. I really don't see where it helps either side.

MR. McDANIEL: Well, I think it will certainly clarify some points I'll raise in argument, you see.

MR. IMHOFF: I can't see where that's relevant, your Honor, to our issue here of obscenity. You rejected my big long instruction on things that were protected by the First Amendment and the reasons they were protected and—

MR. McDANIEL: That's because you had all kinds of negative argument. This points out what is

protected. It's subject to the same objections as that other one. I think it needs to be given; it should be given.

MR. IMHOFF: Can we reserve that one until tomorrow?

THE COURT: All right. I'll reserve that one until tomorrow.

MR. IMHOFF: I'd like a copy of it.

THE COURT: Okay. I'll put a question mark here, and we'll go over that one tomorrow.

MR. IMHOFF: I'd like to copy it down before I leave.

THE COURT: Certainly. It's defendant's 41.

MR. McDANIEL: The rest of these are the ones on stuff that you're going to make your own—

MR. IMHOFF: I haven't seen one—

Is that in regard to the exhibits that you introduced, what they mean?

MR. McDANIEL: Yes.

MR. IMHOFF: I'll wait until tomorrow morning and see what the judge writes up.

MR. McDANIEL: Okay.

To finish this up, I just have one more batch that is real brief.

THE COURT: Okay. The rejected instructions are all set forth here. Give them a look. I think I have indicated on the bottom of each why they're rejected.

MR. McDANIEL: Well, your Honor, there's one stack, defendant's 56, 57, 58, 59, 60, which I'll offer. These are instructions on decisions by the Supreme Court and the California Supreme Court on other materials, and I think they should be given. I am asking your Honor to take judicial notice of the determinations in the cases that are specified, and I would like

to consider them all as a group. The same principle applies to all of them.

THE COURT: Are they subject matter that was presented to this Court?

MR. McDANIEL: No, it was not presented.

THE COURT: Then I will reject them. The jury has not seen the alleged contemporary matters, and there has been no submission to this Court of the particular material.

MR. McDANIEL: Okay. I'd like to have them in the record as rejected, though, because I do object to that. As I say, I have asked your Honor to take judicial notice of those decisions.

MR. IMHOFF: I would object to that.

THE COURT: All right. We'll make those entries. These are the ones that are rejected, and I want you to look them over quickly so you can present whatever arguments you wish at this time. And give them to counsel.

MR. McDANIEL: Your Honor, at this time I have objected on the record to all these rejections. I will not make any further argument, so that—I'll just submit it. I don't want to go over it.

THE COURT: Okay.

What about you? The same?

MR. IMHOFF: Yes. I—

THE COURT: I think we discussed every one of these.

MR. IMHOFF: Yes, we did. And you've rejected them. Is that—

THE COURT: I have rejected them.

Now, with regard to 56—insofar as defendant's 56, 57, 58, 59 and 60, none of the items involved herein have been presented to this jury for comparison and

have not been submitted to this Court for determination of comparability, are outside the scope of the evidence herein. They are written in formula form and are argumentative. And as a consequence, the Court will reject their submission.

MR. IMHOFF: I'd like to call the Court's attention to People's 2 for a minute, the statute itself. I believe this is the 1970 amended statute. There were some changes in the statute, a rewording of it and a rearranging. I believe this is the latest statement of the law. I don't think it's the wording of the statute at the time defendant was—exactly the same wording of the statute at the time the defendant was charged.

MR. McDANIEL: Counsel may be correct in that point. I would stipulate that your Honor could—

THE COURT: All right. Do you want to amend that, then, to have it read as it was? What can we do—

MR. IMHOFF: I think the Complaint itself would be the wording of the statute as it was in '69, because we usually just copy the language of the Complaint.

THE COURT: All right.

Will you do this? Will you write up an instruction to supplant 2 tonight and submit it tomorrow morning?

MR. IMHOFF: Yes. I'll check it over and—

THE COURT: All right.

And would you make a note that we're to discuss 2 and 41?

MR. McDANIEL: Okay.

MR. IMHOFF: I don't know whether it would be appropriate to give this one or the—

MR. McDANIEL: Well, if he makes up one that makes that language the '69 language, I would have no objection to that. The difference is only in a semicolon, I believe, so—

MR. IMHOFF: They've rearranged the language a little bit. Basically, it's the same thing, you know. It's the same offense.

(Recess.)

LOS ANGELES, CALIFORNIA,
TUESDAY, FEBRUARY 2, 1971 9:40 A.M.

(The following proceedings were held in chambers:)

THE COURT: In the case of People versus Murray Kaplan, the record will show defendant is represented by counsel, the People are present and represented; and the following proceedings are in chambers outside the purview of the jury.

Very well, Mr. McDaniel.

MR. McDANIEL: Yes, your Honor.

I previously indicated that I offer the motion picture film Mona as a comparable exhibit to the material charged in this case. The film Mona was found not obscene in a decision which I've previously—

THE COURT: That was a San Francisco Municipal Court decision?

MR. McDANIEL: Yes, by Judge Harry Lowe. That was January 11th. And I believe the record already has the—but I'll repeat that for the record at this time.

The motion picture film Mona was found not obscene in a hearing in the San Francisco Municipal Court in the case of People versus Natali and Sullivan, San Francisco Municipal Court Nos. R22045 and R22047, on January 11, 1971, Judge Harry Lowe, judge presiding.

And that decision was made in a procedural format similar to the procedural format employed in the

trial court-level actions in the Bonanza case previously alluded to wherein a motion to suppress seized evidence was joined with a motion on constitutional determination. And the 1538.5 motion was granted on the basis that the judge found the film to be nonobscene. That film has also enjoyed an over three-month extended run in Los Angeles County at two different theatres without any incidents of arrest or questions raised as to any possible action against it, so that I think it comes in properly as a litigated example of material that's been found not obscene as well as an example of material that is available, tolerated and accepted by the community, as evidenced by its lengthy play here.

Frankly, the film is very comparable. It's a stronger motion picture film, in terms of sexual activity, than any of the exhibits involved in this case, and yet was still found not obscene, as I previously indicated. It's in full color, depicts various sexual and nudity episodes in the life of this girl Mona, essentially. It's now playing at the Eros Theatre. It played at the Cinema Theatre for some two and a half months, then shifted to the Eros Theatre.

And so I offer that in as a comparable on that basis at this time.

THE COURT: Mr. Imhoff?

MR. IMHOFF: Well, one thing I would object to the film, in the sense that—number one, we do not have any record before the Court to indicate what the findings of the court were, whether they made a specific finding of obscenity or whether it was just a—I believe counsel indicated the other day the record just indicated a denial of a motion.

So if that were true, there would be no way to de-

termine what the basis of it was. And we can't go beyond the docket sheets and the minute orders of the court to determine that.

Counsel does not have, apparently, a copy of the film, so there would be no way to offer it into evidence. And I don't think that there's been any showing that the material is comparable. In other words, we'd have to look at it, for one thing, to determine if it was comparable or not.

And it may have had redeeming social importance of some kind or some other reason why it would be—the motion would be denied.

So I would object to it on those grounds.

THE COURT: As I understand it, Mr. McDaniel, the minute order and the docket sheet indicate that there was a 1538.5 motion made, the 1538.5 motion was granted, and there were no findings delineated in either document.

Is that correct?

MR. McDANIEL: No.

The way that I determined what the actual finding was was by two procedures:

First of all, I contacted the attorney who had been involved in the case and found out from him that the film had been found not obscene by Judge Lowe and that the 1538.5 hearing had been expanded, in the sense I have indicated, as similar to the trial court in Bonanza; that is to say, they went beyond merely probable cause questions of seizure and determined the issue of obscenity in the same fashion that Judge Ackerman did in the Bonanza case below.

I further checked that out by contacting the court in San Francisco and determined that that was the case. It's correct that the docket entries don't spell out

—and there is not a memorandum opinion. But that was the basis of the opinion, as indicated both by the court and by the attorney.

The attorney who was involved in that case is Mr. Michael Kennedy of San Francisco who—

THE COURT: I believe you've also indicated that the film involved is a color motion picture with a story line, sound and music.

MR. McDANIEL: Yes. The story line is perhaps —it's hard to say, you know, how you'd describe the story line. What it really is is a very loosely connected series of sexual and nudity episodes, and in that sense it's really very similar to the film charged here, and indeed it's very similar to the other materials charged here, too. And I think it's comparable on a constitutional or First Amendment basis, quite clearly.

It was prosecuted for obscenity. It was found not obscene. It contains a great deal of graphically displayed sexual activity and nudity, a lot of close-ups, full color and so forth.

So that, in my judgment, it's as comparable a motion picture film as one could come up with.

THE COURT: Very well.

MR. McDANIEL: And it is available for, you know, viewing. I'm prepared to defray the expenses of everybody going to see the film.

THE COURT: You're suggesting that the Court take the jury to the Eros Theatre and permit them to see the film?

MR. McDANIEL: That is correct, your Honor.

THE COURT: Well, there has been no documentary evidence presented, by way of a copy of the docket sheet or minute order. There is no documentary evidence with regard to the fact that the determination of the court was based on a finding of nonobscenity.

The Court has not seen the film to determine whether or not it is sufficiently comparable so that it can be submitted to the jury. The Court is not disposed to take the jury to the theatre for purposes of seeing the film, firstly because the Court has not seen the film, and, more importantly, because of the lack of foundation on the question of the determination of the Court.

The offer is rejected.

Now, with regard to the balance of this presentation, do you have any further evidence, Mr. McDaniel?

MR. McDANIEL: Yes.

I have two more items that have been marked which I want to introduce. And I'd like to do that in front of the jury.

THE COURT: What are they?

MR. McDANIEL: One is the entertainment pages of the Los Angeles Times, and the other is the entertainment pages from the Los Angeles Free Press, the current issue of each paper.

THE COURT: What is your offer of proof?

MR. McDANIEL: The offer of proof there is, again, it's just some evidence—not the entire case but some evidence which the jury can properly consider of just what indeed is factually going on, what films are advertised as being playing around the area here. I don't rest the entire case on that, of course, but it is just one piece in the mosaic of evidence that I intend to present, and—

THE COURT: You mean, it will contain titles of pictures that are being shown around town?

MR. McDANIEL: Yes, and descriptions, too, which tend to illustrate quite clearly the point that I am interested in emphasizing here.

THE COURT: All right.

Do you have the exhibits? Let me see them.

MR. McDANIEL: The clerk has them. What I would be willing to do—when I've introduced entertainment pages previously, I would like the record to reflect that they've always been allowed to go in. What I've done is I've—for instance, with this one, and with that one, I take out the material that isn't relevant and just introduce the parts of the paper which are on the films. I'll show you where they are in each of the two here.

The motion picture ads start in the Free Press on page 66 and run through page 71. So that would be the portions that I would intend to introduce.

THE COURT: Well, I don't think it can be determined from the material contained herein whether or not these items would be comparable. The offer as to—

MR. McDANIEL: That's Exhibit U, the Free Press.

THE COURT: Exhibit U, the Free Press, is rejected and denied.

As to the—

MR. McDANIEL: Well, with the Times, I more strenuously urge—that's a—the major paper of the West Coast, really. It's classified as the authoritative newspaper of California. And I've always been able to introduce this material in cases of this nature. It's, I think, only fair to let the jury get some kind of view of what's going on, because that's clearly part, if not all, of what the test of the contemporary standard is.

And the fact that these films are advertised in the Times and are playing in commercial theatres is quite

probative, so I think that it's incumbent upon this Court to allow me to introduce this exhibit.

MR. IMHOFF: I would object, your Honor. I don't believe it's relevant to contemporary community standards. It's the same thing as trying to go out and buy a book and say, well, this is available in the community; I bought it down the street.

I think the Court has already ruled on matters such as that. Just because something is advertised in the newspaper and is showing does not mean it's legal. And defense counsel is trying to infer, by the fact that something is advertised in the newspaper, that therefore it's constitutionally protected.

We have cases filed against a lot of those theatres that advertise in the Times showing these films. And it's just a round-about way of trying to bring in material that's irrelevant to contemporary community standards.

Just because something is being done does not mean that it's accepted by the community, doesn't go beyond the standards.

MR. McDANIEL: Your Honor, let me respond to that argument.

First of all, it's completely off base because there's no claim that the materials being shown have some kind of decision of constitutional protection. What they do show is something about community standards which is helpful. That helps them in determining the issues in this case. They don't need to determine the issues in some other possible case. They're interested in determining only the issues in this case. And this is some evidence of community standards which is perfectly probative and proper to come in.

THE COURT: Well, the problem presented is that, by reading the paper and seeing the titles of motion pictures and maybe even seeing the copy purporting to depict what is shown in the film, without knowing actually what is depicted in the film or presentation or whatever it is that's being advertised, the jury has really no standard. They don't know what has been shown. They have no basis upon which to make a comparison. The fact that there is an advertisement doesn't prove or disprove any of the issues in this case.

As a consequence, the offer of proof is rejected, and the motion to have the item submitted is denied.

MR. McDANIEL: I want those left in the record.

THE COURT: Very well.

MR. McDANIEL: I'd object to the rejection of T and U.

THE COURT: T is the Times movie section, and U is the Free Press. Very well.

MR. McDANIEL: Now, that's the extent of the defense presentation. When the jury comes in, I will rest. I don't know if the prosecution intends to—

MR. IMHOFF: I have one item to offer in rebuttal.

MR. McDANIEL: What is it?

THE COURT: Yes. What is it?

MR. IMHOFF: Has defense rested?

THE COURT: Well, he indicated he would rest as soon as the Court resumed.

MR. IMHOFF: Okay. I'll get it. It's in my briefcase.

THE COURT: Before you present your item, by reason of the Court's instruction that was composed this morning, are you going to withdraw 12, 54, 55, 61?

MR. McDANIEL: Those are the ones that—in your instruction, you've covered specifically all those exhibits so that it won't be necessary to have these; is that correct?

THE COURT: Well, that was the Court's intent.

MR. McDANIEL: Yes. I don't have any objection to not using those and using your own.

THE COURT: All right. Then you're withdrawing 55, 54, 12, 62 and 61?

MR. McDANIEL: Rather than withdraw them, I would prefer it if the record reflected that you rejected those in favor of yours and I made an objection to that, if that's okay, just for the record.

THE COURT: Very well.

The Court will reject the previous-named proposed defendant's instructions on the basis of their repetitious character.

MR. McDANIEL: Then the record, I believe, already reflects a continuing defense objection to each and every defense instruction which was rejected or modified?

THE COURT: Very well. The record will so show.

All right. May I see your—

MR. IMHOFF: Yes. I would ask the Court to take judicial notice of the fact that the magazine entitled "My Name is Bonnie" has been held not to be obscene by the Ninth Circuit Court of Appeals and—

THE COURT: Not to be obscene?

MR. IMHOFF: Held to be obscene. I'm sorry. Held to be obscene. I have the magazine here which I would like to use in rebuttal to the magazines and other materials that defense counsel has offered.

I have a copy of the Ninth Circuit's decision for the Court to look at.

MR. McDANIEL: Well, your Honor, the problem with that is that that case is on appeal now, so it can't be used.

THE COURT: Is it on appeal?

MR. IMHOFF: I don't know. But, of course, even if it were on appeal, defense's exhibits, for example, in the Municipal courts are not final determinations either.

MR. McDANIEL: Yes, they are. They are not on appeal. Those are terminal decisions.

MR. IMHOFF: Any other court of equal jurisdiction could find those magazines to be obscene and —

THE COURT: Well, if this decision or if this matter is being reviewed by a higher court, that vacates the decision below, does it not?

MR. McDANIEL: And it is—

THE COURT: Well, is it or isn't it? If it's a final determination—it would appear to be.

MR. IMHOFF: I don't have any knowledge of the fact it's on appeal. If defense counsel has any proof of that, I'd ask him to bring it forward.

THE COURT: This decision was made September 16, 1970.

MR. McDANIEL: Yes. It's on appeal to the United States Supreme Court at this time, your Honor.

THE COURT: Well, why don't you call the clerk of the Ninth Circuit and determine that? If it is not on appeal, I will consider its submission. If it is, then, of course, that would vacate this decision at this time. It would not be a terminal decision.

Do you want to call?

(There was held a recess.)

THE COURT: The record will show that both counsel have corroborated the fact that the material, subject matter of the decision by the Ninth Circuit Court, Collectors Publications versus United States, has been accepted by the United States Supreme Court. And as a consequence, the decision would be vacated and the Court would be required to reject the offer of proof.

Do you want to have that put in evidence or do you want to describe it for the record and we'll—you can have it indicated by—in case you want to have that portion—

MR. McDANIEL: You could offer it in as your Exhibit A and have the same stipulation that I had, that they can be removed.

THE COURT: If you're both going to rest, why don't you argue your motion right now?

MR. IMHOFF: Well, just let the record note that this has been rejected.

THE COURT: Well, do you want to describe the exhibit for the record?

MR. IMHOFF: Yes. The exhibit was a magazine entitled My Name is Bonnie, which is a—24 color pages and several black-and-white pages of a woman posed in the nude with the vagina exposed and emphasis on the vagina with no apparent sexual activity. And it has been rejected.

THE COURT: And it's the subject matter of what case?

MR. IMHOFF: The People versus Murray Kaplan.

THE COURT: No.

MR. IMHOFF: I'm sorry.

Marvin Miller, Covina Publishing, Incorporated, a

corporation doing business as Collectors Publications versus United States of America. The case number is 23,935. It was the subject of a decision by the Ninth Circuit Court of Appeals, Federal Ninth Circuit of Appeals.

MR. McDANIEL: And now has been taken up by the Supreme Court. Is that correct, Counsel?

MR. IMHOFF: And I've discovered that it has been appealed to the United States Supreme Court for decision.

MR. McDANIEL: Now, may I have a stipulation from counsel that when the jury comes back in the defendant will rest and then the People will rest?

Is that so stipulated, Counsel?

MR. IMHOFF: Yes, I intend to rest.

You have nothing further; is that correct?

MR. McDANIEL: Yes.

MR. IMHOFF: Then I intend to rest. And I would like to—you said something a moment ago, Counsel, about stipulating to having these withdrawn. I believe I stipulated that they could be withdrawn unless he was found guilty.

MR. McDANIEL: Well, then, of course, it's up to the defendant to make sure that the record is properly protected. I would put these materials back into the case for purposes of an appeal.

MR. IMHOFF: I couldn't stipulate that they could be withdrawn if the defendant were found guilty because they would be necessary for the appeal, and there would be nothing to require defense to bring them before the Court.

MR. McDANIEL: Well, that's not technically correct. As a matter of fact, from the counsel for the prosecution's point of view, it would be better if they

weren't in there. But I will make the representation that they will be made part of the record, if it has to go up on appeal, because I do need to use these exhibits in some other matters.

THE COURT: Well, you can always have them brought over and incorporated by reference, if nothing else.

MR. IMHOFF: I believe we had a discussion about that, and I made a point, if he were found not guilty or if they were hung, they could be withdrawn. I don't believe there was any actual stipulation that they could be withdrawn in the event there was a guilty verdict.

THE COURT: I can't recall.

(There was held a recess.)

THE COURT: All right.

Let me hear the 1118 motion.

MR. McDANIEL: Okay.

First of all, it is stipulated, is it not, Counsel, that the materials involved in this case do not constitute hard-pornography?

MR. IMHOFF: I will not stipulate to that because there's been no, you know, court definition of hard-core pornography. The Courts have never defined it, and therefore I can't stipulate to that.

MR. McDANIEL: Well, you would stipulate, with regard to Exhibits 1 and 2, that they do not contain a graphic depiction of sexual activity. Is that correct, Counsel?

MR. IMHOFF: No, I will not stipulate to that.

MR. McDANIEL: All right.

Your Honor, since there's been stipulation by counsel that both sides will rest as soon as the jury returns, I believe it's proper to argue a motion under 1118.1 at

this time, at the conclusion of all the evidence in the case. And I'd like to point out to your Honor that, in determining a 1118.1 motion, the test is whether a conviction would be sustained on appeal. That's written right into the Code language in 1118.1.

Now, the evidence presented in this case by the part of the prosecution shows a failure to prove its case on all the essential elements. For instance, there is no showing whatsoever by the prosecution that the materials don't have any redeeming social importance to any degree. There's no showing by the prosecution, based on any competent evidence, that any of the materials have a predominant theme which appeals to the prurient interest of the average viewer.

With regard to that, it must be pointed out that the witness who testified for the prosecution was unable to base his testimony on prurience on any type of activity which might be construed as a testing of state-wide standards, since he indicated quite candidly in his examination that he had not questioned or tried to determine prurience on a state-wide basis but based that on his experience as a police officer here in L.A. County and by talking to people here in L.A. County.

There also isn't any showing that the materials go substantially beyond customary limits of candor by the prosecution because their witness on that point again testified only that he asked if various activities which he described in his questions went beyond the standards of a given community.

There was no question as to whether any exhibits or any materials go substantially beyond these standards which is the legal test. And there's a pretty radical difference in going beyond and going substantially beyond. The reason that that word is put in there is

to make sure that First Amendment rights are not deprived.

And then when you add to that the evidence introduced by the defense, expert testimony by a truly competent expert that the materials do have social importance, that they do not appeal to a prurient interest and that they do not go beyond customary limits of candor, coupled with comparable exhibits that have been litigated and found to be not obscene, it clearly shows that the materials in this case could not be determined to be obscene and have such a finding sustained on appeal.

Finally, there's no evidence at all in here of any type of scienter that is required by the statute. Knowledge of obscenity has not been shown in any way.

And so, at this state of the evidence in the case, it's quite clear that the prosecution has not established its case beyond a reasonable doubt.

The whole evidence shows that the defendant is simply not guilty and that the materials are simply not obscene materials.

And so I think that your Honor at this point should grant the 1118.1 motion.

I'll submit it.

THE COURT: Mr. Imhoff?

MR. IMHOFF: Yes.

Well, I think everything counsel has said here goes more to the—you know, the weight of the testimony of the expert rather than to any lack of evidence. I think there's plenty of evidence, number one, in the record on the issue of scienter. The courts do not demand that the defendant know that the material is obscene in the constitutional sense, as long as he has some awareness of

the contents of the material, is somewhat aware of the obscene character of the matter.

So I think there's plenty of evidence in regard to his knowledge on that element. I don't think there's any question of the fact that the material was sold and distributed. Our expert did not base his testimony entirely on his survey. He based his testimony on his entire background, and his survey. In his discussions, also on his survey, he was able to make a determination not in whole on prurient appeal—but I'm sure that that was part of the determination of prurient appeal. All the people he's talked to throughout the state and his entire background in the field of vice and dealing with obscenity investigations—and I don't believe that defendant's expert—I would not consider him a well-qualified expert. He hasn't had any survey to speak of in regard to what the contemporary standards are, what prurient appeal is. All he did was talk to some people in the course of his work over a period of time. I think there's much less weight to be given to his testimony than the testimony of our expert.

I think everything counsel is pointing out here goes to the weight of the testimony which is something that the jury has to decide. There's no—I don't think it's possible at all to infer, if a conviction was had here, that it would not be sustained on appeal.

I think the motion should be denied.

MR. McDANIEL: Let me respond to that by pointing out that that argument doesn't go to the issues before the Court under a 1118.1 motion. The language of 1118.1 is quite specific: In a case tried before a jury, the court, on motion of the defendant or on its own motion, at the close of the evidence on either

side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the Court is insufficient to sustain a conviction of such offense or offenses on appeal.

I think it's quite clear that, from the state of the evidence, any possible conviction would not be sustained on appeal. And that's the legal test under 1118.

So, again, I'll submit it.

MR. IMHOFF: I'll submit it.

THE COURT: Very well. The motion to dismiss under Section 1118.1 is denied.

Are you ready to proceed, gentlemen?

MR. IMHOFF: Yes.

THE COURT: All right.

Do you want the argument reported?

MR. IMHOFF: I don't care.

MR. McDANIEL: I don't know if it's necessary.

THE COURT: Do you want the instructions reported?

All right. The instructions will be reported. And the argument is not to be or is to be?

MR. McDANIEL: I think it better be.

(There was held a recess.)

(The following proceedings were held in open court:)

THE COURT: The case of People versus Murray Kaplan.

The record will show the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

You may proceed, Mr. McDaniel.

MR. McDANIEL: The defense is happy to say we rest.

THE COURT: All right.

Will there be any rebuttal?

MR. IMHOFF: No, your honor, no rebuttal.

THE COURT: You rest your case?

MR. IMHOFF: Rest the case, yes, your Honor.

THE COURT: Very well.

Are you prepared for argument?

MR. IMHOFF: Yes, your Honor.

THE COURT: You may proceed.

(Closing arguments.)

THE COURT: (The following are jury instructions:)

Ladies and gentlemen of the jury:

It is my duty to instruct you in the law that applies to this case and you must follow the law as I state it to you.

As jurors, it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence. In performing this duty you must not be influenced by pity for a defendant or by passion or prejudice against him. You must not be biased against a defendant because he has been arrested for this offense, or because a charge has been filed against him, or because he has been brought to trial. None of these facts is evidence of his guilt and you must not infer or speculate from any or all of them that he is more likely to be guilty than innocent.

In determining whether the defendant is guilty or not guilty, you must be governed solely by the evidence received in this trial and the law as stated to

you by the Court. You must not be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

You must not consider as evidence any statement of counsel made during the trial; however, if counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively proved as to the party or parties making the stipulation or admission.

A "stipulation" is an agreement between attorneys as to matters relating to the trial.

As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you had never heard of it.

Both the People and the defendant are entitled to the individual opinion of each juror.

It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

The attitude and conduct of jurors at the beginning of their deliberations are matters of considerable importance. It is rarely productive of good for a juror at the outset to make an emphatic expression of his opinion on the case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused, and he may hesitate to change his position even if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges.

If the Court has repeated any rule, direction or idea, or stated the same in varying ways, no emphasis was intended and you must not draw any inference therefrom. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

The testimony of a witness, a writing, a material object, or anything presented to the senses offered to prove the existence or nonexistence of a fact is either direct or circumstantial evidence.

Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact.

Circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

Every person who testifies under oath is a witness. You are the sole and exclusive judges of the credibility of the witnesses who have testified in this case.

In determining the credibility of a witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to the following:

His demeanor while testifying and the manner in which he testifies; the character of his testimony; the extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies; the extent of his opportunity to perceive any matter about which he testifies; the existence or nonexistence of a bias, interest, or other motive; the existence or nonexistence of any fact testified to by him; his attitude toward the action in which he testifies or toward the giving of testimony.

A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all

the evidence, you shall believe the probability of truth favors his testimony in other particulars.

However, discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. Testimony which you believe given by one witness is sufficient for the proof of any fact. This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a

reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Each count charges a separate and distinct offense. You must decide each count separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other count. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each count must be stated in a separate verdict.

You are not permitted to find the defendant guilty of any crime charged against him based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion and each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt has been proved beyond a reasonable doubt.

Also, if the evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject the other which points to his guilt.

A statement made by a defendant other than at his trial may be either an admission or a confession.

An admission is a statement by a defendant, which by itself is not sufficient to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence.

A confession is a statement by a defendant which discloses his intentional participation in the criminal act for which he is on trial and which discloses his guilt of that crime.

You are the exclusive judges as to whether an admission or a confession was made by the defendant and if the statement is true in whole or in part. If you should find that such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true.

Evidence of an oral admission or an oral confession of the defendant ought to be viewed with caution.

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus the decision as to whether he should testify is left to the defendant, acting with the advice and assistance of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element.

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.

Duly qualified experts may give their opinions on questions in controversy on a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.

In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.

You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

In the crime charged in Counts I, II and III of the Complaint, there must exist a union or joint operation of act or conduct and a certain specific intent.

In the crime of selling or distributing obscene material, there must exist in the mind of the perpetrator the specific intent to distribute, or to exhibit or offer to distribute said material, and unless such intent so exists that crime is not committed.

The specific intent with which an act is done may be manifested by the circumstances surrounding its commission. But you may not find defendant guilty of the offenses charged unless the proved circumstances

not only are consistent with the hypothesis that he had the specific intent to distribute, or to exhibit or offer to distribute said material but are irreconcilable with any other rational conclusion.

Also, if the evidence as to such specific intent is susceptible of two reasonable interpretations, one of which points to the existence thereof and the other to the absence thereof, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to such specific intent appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable.

I instruct you that the law in regard to any question involved in this case is only that which I give you in these instructions, and you are to disregard completely and totally ignore any statement, argument or contention concerning matters of law which you may have heard, seen or read or otherwise become aware of from any source other than these instructions.

You are instructed that every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

You are instructed that "knowingly" means having knowledge that the matter is obscene.

By "knowingly" is meant that the defendant must have known the contents of the material and must have been in some manner aware of its obscene character.

This requirement does not mean that the defendant must know that the matter would be held obscene by court of law.

You are instructed that "obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, or sex, or excretion which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

You are instructed that in the definition which I just read to you the following phrase is used: "The predominant appeal of the matter taken as a whole is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion."

Under the law herein, a prurient interest is only a shameful or morbid interest in sex, nudity or excretion, as distinguished from a candid and normal interest in sex, nudity or excretion.

Words and phrases must be construed according to the context and the approved usage of the language, ordinarily following the dictionary definitions.

Predominant is defined as holding an ascendancy, having superior strength, influence, authority or position, controlling. Appeal is defined as having a particular interest or attraction.

Shameful is defined as disgraceful, indecent.

Morbid is defined as unwholesome, not sound and healthful, diseased, gruesome.

Interest is defined as to engage or attract the attention of; a feeling that accompanies or causes special attention to some object, curiosity, concern.

The word "substantially" has been defined as greatly or considerably or largely.

The average person is, of course, a hypothetical person. The phrase means a person with an average interest in and attitude toward sex; not a libertine and not a person who rarely, if ever, thinks about sex; not a person who thinks sex is the most important thing to be discussed and not a person who thinks sex should never be discussed. The phrase means a normal individual of average sex instincts; not one who is undersexed, not one who thinks sex is the most important factor in life, and not one who is afraid of sex or ignorant of sex or bored by sex. In short, the phrase "average person" means a normal, healthy, average adult man or woman with normal, healthy, average attitudes, instincts and interests concerning sex.

You are instructed that the term "utterly without social redeeming value" means that the material has no literary, scientific, or artistic value in its depiction of sex or nudity.

Material has social importance if it has the capacity to broaden man's range of sympathies or consciousness, or to enable him to see, hear or appreciate what he might otherwise have missed, or deepens his emotions, or makes life seem richer, more interesting or more comprehensible, or offers entertainment, or provides insights into man's relationship to the society in which he lives.

You are instructed that the burden of persuasion as to the lack of redeeming social value is on the prosecution. However, the burden of going forward with the production of evidence as to the existence of redeeming social value is on the defense.

Expert evidence is not required by either the prosecution or defense on this issue.

Under the law, the word "utterly" has been defined as follows: to an absolute or extreme degree; to the full extent; absolutely; altogether; entirely; fully; thoroughly; totally.

You are further instructed that for the purpose of determining the obscenity of the material here in question, the relevant community is the entire State of California.

Freedom of speech and of the press guaranteed by the Constitution embraces all information and education with respect to the significant issues of the times; embraces all issues about which information is needed or appropriate to enable the members of society to cope with the problems of their period.

Various exhibits have been introduced at this trial on the question of contemporary community standards.

These exhibits are composed of materials that have been found not obscene in other litigation.

Defendant's D and Defendant's E were materials found not to be obscene by the Municipal Court of Beverly Hills Judicial District. These decisions rendered by a court of equal jurisdiction are not binding on this Court but can be considered by you for whatever persuasive effect they may have.

Defendant's B were materials found not obscene by the Appellate Department of the Superior Court of Los Angeles County, and this decision is binding on this Court.

Defendant's C and Defendant's J were materials found not obscene by the Supreme Court of the United States. These decisions are binding on this Court.

The above materials were received in order to provide the jury with materials judicially determined to be within the customary limits of candor and to be used as a guideline by you in determining whether or not the materials involved herein are either within or beyond the contemporary standards of the community on a state-wide basis.

The question as to whether the alleged materials are in fact comparable to the material which is the subject of this litigation, to wit, People's 1, 2 and 5, is a question for the jury to determine.

Further, the question as to whether or not People's 1, 2 and 5 exceeds the standards indicated by the alleged comparable material is again a question for you, the jury, to determine.

I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts on any questions submitted to you, or that I believe or disbelieve any witness.

If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to reach a verdict, all 12 jurors must agree to the decision. As soon as all of you have agreed upon a verdict, you shall have it dated and signed by your foreman and then shall return with it to this room.

Would you swear the bailiff, please?

(The bailiff was sworn to take charge of the jury.)

A JUROR: Can we see a copy of the instruction?

A JUROR: Can we have a written copy of your instructions?

THE COURT: No. We cannot send the instructions into the jury. But if you wish to have them reread at a future time, the Court will reread them.

A JUROR: Can you explain something now, your Honor? The question is: Will you go over again what is a reasonable doubt and beyond a reasonable doubt?

THE COURT: Do the other jurors wish me to read the definition of reasonable doubt?

Very well. All right. You may retire to the jury room.

(Whereupon, the jury retired to deliberate at 2:34 p.m.)

MR. McDANIEL: Can counsel approach the bench with the reporter, your Honor?

(The following proceedings were held in chambers:)

THE COURT: The record will show that the following proceedings are in chambers outside the purview of the jury.

MR. McDANIEL: I just wanted to make a specific objection to a couple of matters. My understanding had been, with regard to plaintiff's proposed instruction No. 5, that you would read just the first part which is:

"The predominant appeal of the matter taken as a whole is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion."

My notes clearly indicate that the rest of that particular instruction was going to be omitted, and that particularly is a definition of shameful as disgraceful or indecent and a definition of morbid as unwhole-

some, not sound and healthful, diseased and gruesome. Nevertheless, that instruction was read to the jury. I think that's improper. I think the jury should be instructed leaving that out because that is what was agreed upon in chambers in a hearing on this matter.

MR. IMHOFF: May I comment?

THE COURT: Yes, certainly.

MR. IMHOFF: Well, as I recall, I think counsel raised an objection to that at the time. But, as I recall, the decision of the Court was that it would read the whole thing and add defendant's definitions on "substantial" and on a couple of other definitions, "utterly" and so forth. As I recall, you did not reject that instruction in its entirety but you decided that you would read that and add his.

THE COURT: I can't recall.

MR. IMHOFF: I believe counsel's in error on it, but that's my recollection.

MR. McDANIEL: I don't think so. My notes here show that, with regard to 5, you would modify it so that there wouldn't be these extra verbiages in there to define shameful and morbid.

THE COURT: That was People's 5?

MR. McDANIEL: Yes.

THE COURT: On the—

MR. McDANIEL: Prurient interest aspect.

THE COURT: Well, the only note I put on No. 5 is, after I read the definition "The predominant appeal of the matter taken as a whole is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion"—then I put a parentheses to add defendant's 16 here. And, as I recall, I read 16 at that point.

MR. McDANIEL: Yes, you did, and I think that there was the agreement reached that you weren't go-

ing to read the extra words to define morbid and shameful. It's instructive to note, for instance, that I mentioned that in my argument which I would obviously not have done if I was under the impression you were going to give that other set of terms. And I think that is improper and they should be reinstructed on that point.

THE COURT: Well, I don't recall—of course, we went over so many instructions. I don't recall whether or not that's the situation.

Perhaps, if the reporter will find it in her notes, I'll reinstruct.

MR. McDANIEL: I'm not trying to put any aspersions on this Court. I think the Judge knows me well enough to know that I wouldn't do that. It's just that I think this is one of those unfortunate things that sometimes happens when there's a great body of instructions and a lot of time spent going over them.

MR. IMHOFF: I recall counsel objecting at that point. But it is my recollection, as I said before, that you decided you'd read the whole thing and add his; that you wouldn't strike mine and then add his; that you would add his onto it. Of course, we'll just have to look in the record and—

THE COURT: Well, the only thing I can do—

Would you look in your record and see what you come up with on that?

(There was held a recess.)

(The following proceedings were held in open court:)

(The jury returned to the courtroom at 3:00 p.m. and the following proceedings were held:)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

In note by the change of position, Mr. Boyle, that you've been elected foreman; is that correct?

MR. BOYLE: Yes, sir.

THE COURT: I understand that the jury wishes to have some material read?

MR. BOYLE: We would like to have the charges read to us.

THE COURT: You mean the Complaint?

MR. BOYLE: Yes, sir. There were three, as we recall.

THE COURT: Very well.

MR. BOYLE: Your Honor, part of our problem is relating the evidence which we have in there to the charges. Are those exhibits—we want to know, partly, are those exhibits—for example, is Charge I related to Exhibit 1 in there?

THE COURT: All you're interested in is which exhibit is the subject matter of which count?

MR. BOYLE: That's it, and the reading of the charge, too.

THE COURT: You wish to have the Complaint read, and you want to know which exhibits apply to which—

MR. BOYLE: Yes, sir.

THE COURT: All right.

Municipal Court No. 337,520, the People of the State of California versus Murray Kaplan.

Comes now the undersigned and states that he is informed and believes, and upon such information and belief declares:

That on or about May 15, 1969, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to wit: violation of Section 311.2 of the Penal Code of the State of California was committed by Murray Kaplan, who at the time and place last aforesaid, did willfully and unlawfully and knowingly send and cause to be sent, bring and cause to brought into this State for sale and distribution, and in this State prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter, to wit: an obscene 8 millimeter film entitled "Tammy and Danny."

I believe Tammy and Danny is People's 5.

Count II. For a further, separate and second cause of action, being a different offense, belonging to the same class of crimes and offenses set forth in Count I hereof, affiant complains and says: That on or about the 14th day of May, 1969, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to wit, violation of Section 311.2 of the Penal Code of the State of California was committed by Murray Kaplan, who at the time and place last aforesaid, did willfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this State for sale and distribution, and in this State prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter, to wit: an obscene magazine entitled "Yum-Yum."

That's People's 1.

For a further, separate and third cause of action, being a different offense, belonging to the same class

of crimes and offenses set forth in Counts I and II hereof, affiant complains and says: That on or about the 14th day of May, 1969, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to wit: violation of Section 311.2 of the Penal Code of the State of California was committed by Murray Kaplan, who at the time and place last aforesaid, did willfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this State for sale and distribution, and in this State prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter, to wit: an obscene book entitled "Suite 69."

That's People's 2 in evidence.

Very well. Does that answer your question?

MR. BOYLE: I think so. Exhibit—there's a 4 in there, I believe. That's the photo.

THE COURT: The photo was in the box containing the reel of film at the time it was purchased. No. 3 is the box in which the item came.

MR. BOYLE: Thank you.

THE COURT: Very well. Are there any other questions, Mr. Boyle?

MR. BOYLE: No. That's all at this time, your Honor.

THE COURT: Thank you very much. You may retire.

(The jury retired to resume their deliberations at 3:07 p.m.)

(The jury returned to the courtroom at 4:30 p.m. and the following proceedings were had:)

THE COURT: Case of People versus Murray Kaplan.

The record will show that the defendant is represented by counsel, the People are present and represented, the jurors are all seated in their respective places in the jury panel box.

Ladies and gentlemen of the jury, it's now 4:30. I would assume that you have many, many things to discuss and that there would be no prospect of a verdict today.

THE FOREMAN: That is correct, sir.

THE COURT: Of course, it's my duty to make sure that the deliberations of the jury are completely untainted. I have the discretion to do one of two things: I can make sure that there are no outside discussions by imprisoning you in the opulence of the Biltmore Hotel or I can permit you to return to your homes.

Now, if I permit you to return to your homes, it would be necessary that you be admonished that you're not to discuss this matter in any group less than the entire panel. It would be improper for you, as you walk to the car, to discuss any of these matters in sub-groups of the total jury; that all your deliberations must be in the presence of one another in the jury deliberating room. Of course, you would not be permitted to discuss any of these matters when you are outside of the courtroom. And, of course, it would be improper for you to perform any experiments outside—well, it's improper for you to perform any experiments, period, such as attempting to find bookstores or look at material other than that that has been presented to you in this case.

If I were to permit you—firstly, let's determine which you would prefer. Would you rather go to the Biltmore Hotel or would you rather go home?

THE JURORS: Home.

THE COURT: All right. The record will show that there is unanimous response indicating that the jurors would prefer to go home.

If the Court permits you to go home, do you think you can follow these instructions and refrain from discussing these matters among yourselves or with anybody else until you return to the jury deliberating room tomorrow morning whereupon you will proceed where you left off today?

THE FOREMAN: Yes, sir.

THE COURT: All right. I'll accept your word.

For the record, you're admonished that you're not to discuss these matters among yourselves nor with anyone else, nor are you to form or express any opinion thereon until—of course, you've already expressed opinions. But you may not express any opinions thereon outside the deliberating room in groups of less than the total jury. And, of course, you're not to discuss any of these matters with anyone other than your fellow jurors.

You'll be excused at this time and ordered to report back to this court at 9:00 a.m. tomorrow morning without further order, notice or subpoena.

Upon all of the jurors assembling in the courtroom, the bailiff is instructed to usher them into the assembly room to resume their deliberations. Of course, you may not go into the assembly room unless you're all here; so it would behoove everybody to be here at the time indicated so that you can resume your deliberations where you left off.

All parties and witnesses in the Kaplan case are excused and ordered to report back tomorrow, 9:15 a.m.

State of California, County of Los Angeles—ss.

I, JOSIE COLBY, C.S.R., an Official Reporter of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, do hereby certify that the foregoing 513 pages comprise a true and correct partial transcript of the testimony taken and the proceedings had in the case of THE PEOPLE OF THE STATE OF CALIFORNIA VS. MURRAY KAPLAN, No. 337,520.

DATED this 16th day of May, 1971.

Official Court Reporter

STIPULATION

We hereby stipulate that the foregoing is a true and fair partial transcript of the testimony given and the proceedings had upon the trial in the above-entitled action.

DATED this ..... day of ....., 1971.

.....

Attorney for Plaintiff-Respondent

.....

Attorney for Defendant-Appellant

I hereby certify that the foregoing transcript consisting of 513 pages is a true and correct partial transcript and the same is settled, allowed and made a part of the record of this case.

DATED this ..... day of ....., 1971.

.....

JUDGE

Jury Instructions.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. No. 337520.

People vs. Kaplan. CR. A 10391.

Filed June 22, 1971.

REFUSED

Filed 2-4-71 George J. Barbour, Clerk, By Joan G. Vanberg, Deputy.

I hereby certify this to be a true and correct copy of the original Jury Instructions refused on file in this office. WILLIAM H. McCLOUD, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. By Barbara L. Stepnick Deputy.

The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a "clean slate"—with no evidence again him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all evidence in the case.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229.

DEFT'S PROP. INST. NO. 1
Rejected as repetitious DJA

The question before you can never be: Will the prosecution win or lose the case? The prosecution always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed.1314.

DEFT'S PROP. INST. NO. 2
Rejected as formula DJA

The definition of "obscenity" includes a number of essential ingredients or conditions. The Court will now list these ingredients or conditions, but the Court would caution the jury at the outset that the material involved herein cannot be found obscene unless all the ingredients and conditions are present and applicable:

1. Material cannot be deemed obscene unless the material, taken as a whole, goes substantially beyond customary limits of candor, in the State of California as a whole, in the description or representation of matters pertaining to sex, nudity or excretion;

2. In addition, material cannot be deemed obscene unless, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest;

3. In addition, material cannot be deemed obscene unless the material is utterly without redeeming social importance.

The Court will now explain to you the meaning and significance of each of the aforesaid ingredients of the definition of obscenity, but the Court repeats again that no material can be found to be obscene unless all of these ingredients or conditions are found to exist.

California Penal Code §311;

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 3
Rejected as repetitious & Formula DJA

You will note that there are several conditions specified in the definition of "obscenity" as I have given it to you. The mere fact that one or more of the conditions is present or applicable, as you judge the material herein, does not make such material obscene unless all the conditions for obscenity are present and applicable.

If the material does not, beyond a reasonable doubt, go substantially beyond customary limits of candor, in the State of California as a whole, in the description or representation of matters pertaining to nudity, sex or excretion, then the material may not be found obscene, even if the material are found by you to have no social importance or to appeal to the prurient interest of the average person.

If the material does not, beyond a reasonable doubt, appeal to the prurient interest of the average adult, then the material may not be found obscene, even if the materials are found by you not be found obscene, even if the materials are found by you to go substantially beyond the customary limits of candor, in the State of California as a whole, in the description or representation of matters pertaining to nudity, sex or excretion, or to have no social importance.

If material has social importance, then the material may not be found obscene, even if the material is found by you to appeal to prurient interest or to go substantially beyond the customary limits of candor, in the State of California as a whole, in the description or representation of matters pertaining to nudity, sex or excretion.

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 4
Rejected as repetitious & formula DJA

You are instructed that if you find that the material in question is not obscene within the legal meaning of that term as the Court has given it to you, then regardless of any and all other circumstances, you must find the defendant not guilty.

DEFT'S PROP. INST. NO. 5
Rejected as formula instruction DJA

Your own personal and social views on material such as that charged in the complaint may not be considered. Thus, whether you believe that the material is good or bad is of no concern; so, too you may not consider whether in your opinion the material is moral or immoral; whether it is likely to be helpful or injurious to the public morals. Similarly, whether you like or dislike the material, whether it offends or shocks you, may not be considered by you.

People v. Noroff, 67 C.2d 791, 433 P.2d 479, 63 Cal.Rptr. 575.

DEFT'S PROP. INST. NO. 6
Rejected as repetitive DJA

The population of the State of California reflects many different ethnic and cultural backgrounds, and the test for judging the obscenity of any material is a statewide standard. No lesser geographical framework for judging this issue may be used by you.

Manual Enterprises, Inc. v. Day, 370 U.S. 472, 82 S.Ct. 1432, 8 L.Ed.2d 639;
Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 167, 12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 8
Rejected as repetitious DJA

In judging the material herein, it is necessary to take into account customary limits of candor, in the State of California as a whole, in the description or representation of matters pertaining to sex, nudity or excretion. In this regard, you must consider what is going on, not what ought to be going on.

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 9
Reject as repetitious DJA

The contemporary community standards to which the law makes reference are set by what is in fact accepted, and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept.

Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed. 2d 1512.

DEFT'S PROP. INST. NO. 10
Rejected as argumentative DJA

The contemporary community standard of the State of California is set by what is in fact accepted in the community as a whole, and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. It is a matter of common knowledge, of which the Court takes judicial notice, that customs change; that the community may from time to time find acceptable that which

some particular segment of the population may regard as an unacceptable appeal to prurient interest.

See, Suggested Jury Instructions by the Honorable William C. Mathes, in 27 F.R.D. at 156.

DEFT'S PROP. INST. NO. 11
Rejected as argumentative DJA

In determining and applying the contemporary community standard, you have the right to consider what, as shown by the evidence, appears in contemporary magazines, books, newspapers, television, motion pictures, novels and other media of communication in the community.

See, Suggested Jury Instructions by the Honorable William C. Mathes, in 27 F.R.D. at 156;

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793;

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639.

To be rewritten.

DEFT'S PROP. INST. NO. 12
Rejected as repetitious DJA

It is a matter of common knowledge, of which the Court takes judicial notice, that people differ widely in their taste with regard to the propriety or desirability of motion pictures. What may appear to some people to be bad taste or offensive may appear to be amusing or entertaining to others. Obscenity is not a matter of

individual taste. The personal opinion of a juror that the material here in question is or is not offensive or in bad taste is not a sufficient or proper basis for a determination whether or not the material is obscene.

Hannegan v. Esquire, 327 U.S. 146, 66 S.Ct. 456, 90 L.Ed.586.

DEFT'S PROP. INST. NO. 13
Rejected as argumentative DJA

No arm of government—and that includes you acting as jurors has the power to suppress matter by subjective rather than by confining objective standards. You may not make your personal opinion the rule of judgment and approve or condemn the matter as it shall square with or diffet from your own standards.

Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L.Ed. 1093;

Near v. Minnesota, 283 U.S. 697, 713, 51 S.Ct. 625, 75 L.Ed. 1357.

DEFT'S PROP. INST. NO. 14
Rejected as argumentative DJA

You may not rely on instinct in determining whether material is obscene. The ascertainment of obscenity cannot be a merely subjective reflection of the taste or moral outlook of individual jurors. The determination of obscenity cannot be made on the basis of the personal upbringing or restricted reflection or particular experience of life of the individual juror.

Mr. Justice Frankfurter concurring in

Smith v. California, 361 U.S. 147, 165, 80 S. Ct. 215, 225, 4 L.Ed.2d 205;

In re Giannini, 69 C.2d 563, 72 Cal.Rptr. 665.

DEFT'S PROP. INST. NO. 15
Rejected as argumentative DJA

In judging whether material is "obscene", the work must be considered as a whole, in its entirety. No material may be condemned as a whole merely because some passage, scene, excerpt or picture therein is deemed objectionable.

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

DEFT'S PROP. INST. NO. 19
Rejected as repetitious DJA

All material under the law herein cannot be judged merely by the effect of an isolated scene upon particularly susceptible persons.

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

DEFT'S PROP. INST. NO. 20
Rejected as reptitious DJA

The appeal of the material involved herein must be measured only by its appeal to the average adult person.

Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412.

DEFTS. PROP. INST. NO. 22
Rejected as repetitious DJA

Under the statute herein, only hard core pornography, as defined hereafter by the Court, can be found to be obscene.

Zeitlin v. Arnebergh, 59 C.2d 901, 383 P.2d 152, 31 Cal.Rptr. 800.

DEFT'S PROP. INST. NO. 25
Rejected as formula, argumentative & repetitive.

Hard core pornography means that type of material which consists principally of erotic objects; or photographs of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts; of booklets containing drawings not only of normal fornication, but also of perversion of various kinds; and films showing people of both sexes engaged in orgies which include every form of sexual activity. Hard core pornography does not include material which is merely tasteless or coarse or offensive to the sensibilities of the reader or viewer.

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793;

Grove Press, Inc. v. Gerstein, 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed. 1305;

Roth v. United States, Brief on behalf of the United States by the Solicitor General, 37-38.

DEFT'S PROP. INST. NO. 26
Rejected as formula, argumentative & repetitive DJA

In determining whether or not the motion picture involved herein does or does not exceed contemporary standards or appeals to the prurient interest or is utterly without social importance, you must consider material that has been adjudicated as being not obscene.

In re Harris, 56 C.2d 879, 16 Cal.Rptr. 889 (1961).

DEFT'S PROP. INST. NO. 27
Rejected as formula DJA

Under the statute here involved material cannot be condemned solely upon the ground that it is allegedly obscene. If the material involved here was exhibited only to adults and if the material was not forced upon unwilling recipients, then the material is entitled to constitutional protection.

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542;

Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515;

Rowan v. United States Post Office Department, 397 U.S. 728, 90 S.Ct. 1484;

Stein v. Batchelor, 300 F.Supp. 602 (D.C. Tex. 1969);

Karalexis v. Byrne, 306 F.Supp. 1393 (D.C. Mass. 1969);

United States v. Thirty-Seven (37) Photographs, 309 F.Supp. 36 (D.C. Cal. 1970);

United States v. Lethe, 312 F.Supp. 421 (D.C. Cal. 1970);

United States v. Reidel, No. 5845-HP (D.C. Cal.);

United States v. Langford, 315 F.Supp. 472 (D.C. Minn. 1970);

Sexual Freedom in Denmark, et al. v. Vavreck, et al., No. 4-70-Civil 273, unreported;

United States v. Orito, No. 70-Cr.-20, unreported;

Hayse, et al. v. Hoomissen, et al., Civ. No. 69-743 (D.C. Ore.), unreported;

United States v. B & H Dist. Corp., et al., 70-Cr. 67, unreported.

DEFT'S PROP. INST. NO. 28
Rejected as formula DJI.

The statute under which this prosecution is concerned requires knowledge by the defendant that the material named in the complaint was "obscene". At the time it was sold.

Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205;

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639;

New York Times Co. v. Sullivan, 376 U.S. 254, 284-288, 84 S.Ct. 710, 11 L.Ed.2d 686.

DEFT'S PROP. INST. NO. 29.
Rejected as repetitive DJA

Knowledge of the alleged obscenity of the material here cannot be inferred merely from the fact, that the defendant sold the material.

Smith v. California, 371 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d 205;

Manual Enterprises, Inc. v. Day, 370 U.S. 472, 82 S.Ct. 1432, 8 L.Ed.2d 639;

Grove Press, Inc. v. Gerstein, 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed.2d 1305.

DEFT'S PROP. INST. NO. 30
Rejected as repetitious.

Even if you find that the defendant knew the material, dealt with the subject of sex or sexual deviation, that fact in itself is insufficient to support a finding that the defendant was aware of the obscene character of the material.

DEFT'S PROP. INST. NO. 31
Rejected as repetitious

Even if you should find that the defendant saw the materials and knew the contents, that fact by itself would be insufficient to support a finding that he had knowledge of the obscene character of the materials. This is so because many persons can have, and do have, good faith disagreement as to whether or not material is obscene.

Zeitlin v. Arnebergh, 59 C.2d 901, 383 P.2d 152, 31 Cal.Rptr. 800;

People v. Fritch, 13 N.Y.2d 119, 243 N.Y.S. 2d 1, 192 N.E.2d 713.

DEFT'S PROP. INST. NO. 32
Rejected as repetitious formula DJA

"Knowingly" means with knowledge or willfully. But the word "knowingly" also includes the meaning that the act is done with an evil motive or bad purpose. The use of the word "knowingly" assures that no one will be convicted because of mistake and inadvertence or other innocent reason.

Manual Enterprises, Inc. v. Day, 370 U.S. 472, 82 S.Ct. 1432, 8 L.Ed.2d 639.

DEFT'S PROP. INST. NO. 34
Rejected as repetitious DJA

Knowledge of the alleged obscenity of the materials here involved cannot be inferred merely from the depiction of nude bodies, male or female, including the genital and rectal areas and pubic hair.

Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205;

Manual Enterprises, Inc. v. Day, 370 U.S. 472, 82 S.Ct. 1432, 8 L.Ed.2d 639;

Grove Press, Inc. v. Gerstein, 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed.2d 1305.

DEFT'S PROP. INST. NO. 35
Rejected as formula DJA

In order to establish the offense charged in the complaint herein, the evidence must show beyond a reasonable doubt all of the following elements:

1. That the materials named in the complaint are obscene. That is to say, that the said materials, taken as a whole, go substantially beyond the customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; and in addition, that the dominant theme of each matter, to the average person, applying contemporary community standards, taken as a whole, appeals to the prurient interest; and in addition, that the materials are utterly without redeeming social importance.

2. That the defendant knew the contents of the materials named in the complaint.

3. That the defendant was aware of the obscene character of the materials named in the complaint, that is, that the defendant knew that the materials named in the complaint, taken as a whole, go substantially beyond the customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; and in addition, that the defendant knew that the predominant appeal of the materials, to the average person, applying contemporary community standards, taken as a whole, are to the prurient interest; and in addition, that the defendant knew that the ma-

terials are utterly without redeeming social importance.

4. That the defendant had the specific intent to appeal to the prurient interest of the average person viewing the materials named in the complaint.

As you have been instructed, the statute involved herein requires that the defendant had knowledge of obscenity, that is to say, that the defendant was aware of the obscene character of the material named in the complaint. In this connection, I instruct you that if you may consider the fact, if you find it to be a fact, similar materials have been exhibited in theaters and stores throughout the State of California as a whole.

DEFT'S PROP. INST. NO. 37
Rejected as formula DJA

The statute herein requires proof, in addition to knowledge of obscenity, of a specific intent to appeal to the prurient interest of the average person who may view the materials involved herein.

Manual Enterprises, Inc. v. Day, 370 U.S. 472, 82 S.Ct. 1432, 8 L.Ed.2d 639.

DEFT'S PROP. INST. NO. 38
Rejected as repetitious DJA

Neither sex nor nudity, in and of themselves, are synonymous with obscenity.

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639;

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 40
Rejected as repetitious & formula DJA

The mere fact that material depicts sexual activity, masturbation, male or female genitalia, bare buttocks or pubic hair is insufficient reason to condem such material as obscene in law.

Bloss v. Dykema, 398 U.S. 278, 90 S.Ct. 1727, 27 L.Ed.2d 230;

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639;

United States v. "Language of Love", 432 F.2d 705 (2 Cir. 1970);

Pinkus v. Pitchess, 429 F.2d 416 (9 Cir. 1970), affirmed, 91 S.Ct. 185;

United States v. "I Am Curious-Yellow", 404 F. 2d 196 (2 Cir. 1968);

United States v. One Carton "491", 367 F.2d 889 (2 Cir. 1966).

DEFT'S PROP. INST. NO. 42
Rejected as formula DJA

The free speech provisions of the Constitution of the United States guarantee accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. A requirement that literature or art conform to some norm prescribed by an official smacks of ideology foreign to our society. From the multitude of competing offerings, the public will pick and choose. What seems to one to be trash will have for another some fleeting or even enduring values.

Hannegan v. Esquire, 327 U.S. 146, 66 S.Ct. 456, 90 L.Ed. 586.

DEFT'S PROP. INST. NO. 45
Rejected as argumentative & formula DJA

The material here involved cannot be found obscene unless the proof shows beyond a reasonable doubt that the dominant theme of the material, taken as a whole, applying contemporary community standards, creates a clear and likely danger that it will bring about unlawful conduct on the part of the average person viewing such material. The degree of imminence of such unlawful conduct must be extremely high before material can be deemed without Constitutional protection.

Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1367, 8 L.Ed.2d 569.

DEFT'S PROP. INST. NO. 47
Rejected—Repetitious formla.

Literature and the arts are protected by the First Amendment. Materials which may deal with the subject of sex or the subject of nudity are as fully protected by the constitutional guarantees as are those which deal with other important subjects of our time.

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed. 639;
Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793.

DEFT'S PROP. INST. NO. 48
Rejected Formula DJA

Sex and obscenity are not synonymous. The portrayal of sex in art, literature and scientific works is not itself a violation of the statute. Sex is one of the vital problems of human interest and public concern.

The freedom of speech and the press guaranteed by the Constitution embraces the liberty to discuss pub-

licly and truthfully all matters of public concern, including sex.

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498.

DEFT'S PROP. INST. NO. 49
Rejected as formula DJA.

A work designed to entertain or amuse is as much entitled to the protection of free speech as a scientific or educational work.

Jos. Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098;

Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840.

DEFT'S PROP. INST. NO. 50
Rejected as formula & argumentative DJA.

The Court instructs the jury that no defendant on trial for crime can be required to take the stand and testify against himself, to produce papers or to give information which he controls, or to prove the charge against him. This is his full legal right, and there is to be no presumption drawn against a man of any kind if he sees fit not to take the stand to testify. It is as much his right to sit still and say nothing as it is his right to walk down the street, and he is not to be criticized for exercising that right. The jury is instructed that a defendant has the right under the law not to testify, and therefore, as a matter of law, you, the jury, are not entitled to draw any adverse inferences whatsoever against a defendant because he exercised his privilege

accorded to him under the law of standing upon the case made against him by the government without being sworn or testifying in his own behalf.

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106.

DEFT'S PROP. INST. NO. 53
Rejected as repetitious.

I again advise you that in applying present day community standards you must consider material that has been adjudicated as being not obscene. In this connection, you are instructed that the magazine entitled "Jaybird Photographer No. 9" has been held by the United States Supreme Court to be not obscene and to be protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution.

Bloss v. Dykema, 90 S.Ct. 1727 (June 1, 1970)

DEFT'S PROP. INST. NO. 54
Rejected-repetitious DJA.

In applying present day community standards, you must consider material that has been adjudicated as being not obscene. In this connection, I advise you that the books entitled "Adam and Eve", and have been held to be not obscene and to be protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution by the Supreme Court of the United States. These books had been held by lower courts to be "filth for the sake of filth", but the Supreme Court of the United

States nevertheless held that the material was not obscene and entitled to constitutional protection.

Hoyt v. Minnesota, 90 S.Ct. 2241 (June 29, 1970), rvrsg. 174 N.W.2d 700.

DEFT'S. PROP. INST. NO. 55
Rejected—repetitious DJA

As I advised you, in applying present day community standards, you must consider material that has been adjudicated as being not obscene. Again, in this connection, I instruct you that the books entitled "Lurid Sinner", "Sin Crop" and "Sands of Shame" and the magazines "Niftees", Vol. 195 and "Peek-A-Boo", No. 4 have been held by the United States Supreme Court to be not obscene and to be protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution. The trial court in Ohio had held the material to be obscene in all essential respects but the United States Supreme Court reversed and held that all the books and magazines were entitled to constitutional protection.

Walker v. Ohio, 90 S.Ct. 1884 (June 15, 1970).

DEF'S. PROP. INST. NO. 56
Rejected as formula, argumentative & outside scope of evidence herein DJA

I again advise you that in applying present day community standards you must consider material that has been adjudicated as being not obscene. In this connection, you are instructed that the magazines entitled "Candid", Vol. 8, No. 8, "Hefty", Vol. 2 No. 12, and "Nudist Way of Life", Vol. 1, No. 4 have been held

by the United States Supreme Court to be not obscene and to be protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution.

Carlos v. New York, 90 S.Ct. 395 (December 8, 1969).

DEF'S. PROP. INST. NO. 57
Rejected as formula, argumentative & outside scope of evidence herein DJA

I advise you that the magazine "International Nudist Sun", Vol. 1, No. 5, which contains numerous photographs of naked adults, and makes no effort to conceal either male or female genitals, has been held by the California Supreme Court to be not obscene and entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution and the free speech and press protective provisions of the California Constitution.

People v. Noroff, 67 Cal.2d 791, 433 P.2d 479, 63 Cal.Rptr. 575 (1967).

DEF'S. PROP. INST. NO. 58
Rejected as formula, argumentative & outside scope of evidence herein DJA

I advise you that four packets of photographs depicting nude females, and in which the subjects assume various poses which emphasize various parts of the body, have been held by the California Supreme Court to be not obscene and entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution and the free speech and

press protective provisions of the California Constitution.

In re Panchot, 70 Cal.2d 105, 448 P.2d 385, 73 Cal.Rptr. 689 (1968).

DEF'S. PROP. INST. NO. 59
Rejected as formula, argumentative & outside scope of evidence herein DJA

I advise you that the magazines "Les" and "Exciting" were held to be entitled to constitutional protection under the First and Fourteenth Amendments by the judgment of the United States Court of Appeals for the First Circuit, and that a subsequent petition for review to the United States Supreme Court by the State was denied by the Supreme Court. The federal court held that magazines consisting primarily of photographs, which depicted young women either largely or totally undressed, exposing various portions of their body, but generally focusing on the vulva, were not obscene.

Hunt v. Keriakos, 428 F.2d 606 (1 Cir. 1970) cert. den. 91 S.Ct. 185 (November 23, 1970).

DEF'S. PROP. INST. NO. 60
Rejected as formula, argumentative & outside scope of evidence herein DJA

You are instructed that the magazines "Eager Beaver" and "Fluff" were found not obscene by the app. dept. of the Superior Court. You are bound by that decision.

DEFENDANT'S PROPOSED INSTR. No. 61
Rejected repetitious DJA

You are instructed that the magazines "The Foxes" and "Fantastic" were found not obscene by the Beverly Hills Municipal Court. You must give that decision persuasive weight in your deliberations.

DEFT'S PROPOSED INSTR. NO. 62
Rejected—repetitious DJA

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinions —have the full protection of the guarantees of freedom of speech and press unless excludable because they encroach upon the limited idea of more important interests. Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Obscenity is not within the area of constitutionally protected speech or press.

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any constitutional problem. These include the lewd and obscene. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefits that may be derived from them are clearly outweighed by the social interests in order and morality.

Sex and obscenity are not synonymous. The portrayal of sex, e.g., in arts, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the

vital problems of human interest and public concern. On the other hand, obscene material is material which deals with sex in a manner appealing to prurient interest.

Roth v. United States, 354 U.S. 476
1 Lawyer's Edition 2d 1498
77 Supreme Court, 1304 at 1507, 1508

PLAINTIFF'S PROPOSED INSTRUCTION NO. 8.
Refused repetitive & argumentative.
DJA.

Verdict—Criminal.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

The People of the State of Cailfornia, Plaintiff, vs. Murray Kaplan, Defendant. Case No. 337520 Div. 21.

We, the jury in the above-entitled cause, find the defendant Murray Kaplan Not Guilty of the offense charged, to wit: violation of Sec. 311.2 P.C. (Ct. I). Dated February 2, 1971.

Bradley T. Boyle
Foreman

Filed June 22, 1971.

I hereby certify this to be a true and correct copy of the original verdict on file in this office. WILLIAM H. McCLOUD, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. By Barbara L. Stepnick Deputy.

Verdict—Criminal.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

The People of the State of California, Plaintiff, vs. Murray Kaplan Defendant. Case No. 337520 Div. 21.

We, the jury in the above-entitled cause, find the defendant Murray Kaplan Guilty of the offense charged, to wit: Violation of Sec. 311.2 P.C. (Ct. III).

Dated February 3, 1971.

Bradley T. Boyle
Foreman

Filed June 22, 1971.

We hereby certify this to be a true and correct copy of the original verdict on file in this office. WILLIAM H. McCLOUD, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. By Barbara L. Stepnick Deputy.

Verdict—Criminal.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

The People of the State of California, Plaintiff, vs. Murray Kaplan Defendant. Case No. 337520 Div. 21.

We, the jury in the above-entitled cause, find the defendant Murray Kaplan Not Guilty of the offense charged, to wit: Violation of Sec. 311.2 P.C. (Ct. II)

Dated Feb. 4, 1971.

Bradley T. Boyle
Foreman

Filed June 22, 1971.

I hereby certify this to be a true and correct copy of the original verdict on file in this office. WILLIAM H. McCLOUD, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California. By Barbara L. Stepnick Deputy.

Respondent's Brief on Rehearing.

Superior Court of the State of California for the County of Los Angeles, Appellate Department.

People of the State of California, Plaintiff and Respondent, -vs- Murray Kaplan, Defendant and Appellant. CR A 10391

I

PENAL CODE SECTION 311(A)(2) AND 312.1 ARE NOT APPLICABLE.

This court in affirming the conviction made reference to Penal Code Section 311(A)(2) which is an embodiment of *Ginzburg v. United States* [1966] 383 U.S. 463, 16 L.Ed.2d 31. At page 35, footnote 6 the United States Supreme Court refers to the fact the theory of the prosecution made the mode of distribution relevant to the determination of obscenity although there was not a federal "pandering obscenity" statute, the *Ginzburg* case was tried in the context of the circumstances of production, sale and publicity.

In the instant case this apparently was not the theory under which the appellant was prosecuted. The trier of fact was not instructed regarding Penal Code Section 311(A)(2). The prosecution did not argue this concept at trial and/or on appeal. The prosecution did present evidence of the circumstances surrounding the sale which evidence would be necessary to establish "scienter." The advertising in the book would have been before the trier of fact as "part" of the book.

The trier of fact in reviewing the material alleged to be obscene could properly consider the advertising as an integral part of the book. The appellant made no request to "strike the advertising" from the book.

The trier of fact in considering the scienter evidence and the total book itself made a proper determination that the book was hard-core pornography.

At the time the appellant was arrested, Penal Code Section 311(A)(2) had not gone into effect. Respondent believes the court would be bound by *People v. Rosakos* [1968] 268 Cal.App.2d 497, 500 where that court said that "the seller's statement certainly cannot make that which is not obscene, obscene."

It should be noted that by citing *Rosakos* respondent is in no way conceding that the material herein is "not obscene." Respondent merely contends that if the book viewed in light of the scienter evidence is not hard-core pornography, then this court may not rely on Penal Code Section 311(A)(2) to find the book obscene.

In *People v. Noroff* [1967] 67 Cal.2d 791, 793 the court stated that the complaint "did not charge the defendants with pandering; second, the State Legislature has created no such crime." The enactment of Penal Code Section 311(A)(2) did not create a separate crime of pandering. The statute merely made certain evidence probative with respect to the nature of the matter.

Therefore, the case herein will have to be decided on the book per se, plus the evidence pertaining to scienter. While the evidence of circumstances surrounding the sale may properly have been considered by the trier of fact, respondent does not believe this court may rely on Penal Code Section 311(A)(2). This evidentiary rule was not in effect at the time the appellant was arrested.

This court also made reference to Penal Code Section 312.1. This statute also was not in effect at the

time appellant was arrested. Even if it had been in effect it is questionable whether it is applicable in that the prosecution did present expert testimony. The defense also put on an expert witness. By finding the appellant guilty, the jury obviously disregarded the defense expert and determined that the book was utterly without redeeming social value.

The defense expert was examined and cross-examined. By the cross-examination, the prosecution "destroyed" the contention that the book had redeeming social value. The prosecution was not required to present further evidence.

The prosecution complied with the requirements of *People v. Newton* [1970] 9 Cal.App.3d Supp. 24, 28. "Where the burden of persuasion as to lack of redeeming social value is on the prosecution, where the other elements of obscenity exist the burden of going forward should be and we feel is on the defendant."

Although appellant attempted to prove that the material had social importance, it was not incumbent upon nor mandatory for the prosecution to produce additional evidence. The jury was not bound to accept the defense evidence.

Respondent contends that while this court may have misapplied Penal Code Sections 311(A)(2) and 312.1 in this case the court did properly determine that the book was hard-core pornography. The judgment of conviction should be affirmed.

Respectfully submitted,

ROGER ARNEBERGH,
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MICHAEL T. SAUER,
Assistant City Attorney
Attorneys for Respondent